A

# TREATISE ON THE LAW

RELATING TO THE

# CUSTODY OF INFANTS.

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# TREATISE ON THE LAW

RELATING TO THE

# CUSTODY OF INFANTS,

IN CASES OF DIFFERENCE BETWEEN

# PARENTS OR GUARDIANS.

BY

WILLIAM FORSYTH,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW, AND LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE.

AUTHOR OF "A TREATISE ON COMPOSITION WITH CREDITORS."


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# THE LAW

RELATING TO

# CUSTODY OF INFANTS.

## CHAPTER I.

### THE RIGHTS OF PARENTS AND JURISDICTION OF COURTS IN QUESTIONS OF CUSTODY.

§ 1. THE state of the law relating to the custody of the persons of infants is not very satisfactory. Not only are there defects which can, perhaps, be remedied only by the authority of the Legislature; but there prevails an uncertainty in the application of the law, as it exists, to the difficult cases which frequently arise in connection with the disposal of minor children. This is owing in a great measure to the fact, that in the exercise of their jurisdiction in the matter, which, to use the words of Mr. Justice Story (*a*), "is

(*a*) Equity Jurisprudence, § 1342.

admitted to be of extreme delicacy and of no inconsiderable embarrassment and responsibility," Courts of Equity and Common Law find that much is necessarily left to their *discretion*, which varies according to the circumstances of each particular case.

The object of the following pages is to present in a convenient compass the view which in modern times those courts seem disposed to take of the frequently conflicting wishes and claims of parents or guardians, when family differences unhappily occur, or other circumstances exist, which call for the interference of judicial authority.

First, however, it may be not without interest, and, perhaps, utility, to consider the view which has been taken in other countries of the legal rights of parents over their children.

§ 2. The Roman law was distinguished for the stern severity with which it upheld the paternal authority. It gave the father, in fact, absolute power. *Jus autem potestatis, quod in liberos habemus, proprium est civium Romanorum. Nulli enim alii sunt homines qui talem in liberos habeant potestatem, qualem nos habemus* (*b*). According to Dionysius

(*b*) Inst. i. 9, § 2. See Heinecc. Elem. Jur. Civ. Pandect. tit. vi. § 143, *et seq.* Vinnius in Institut. p. 45, says, *Romanorum in liberos potestas neque finem habuit, nec modum.* And where a father brought an action to recover possession of his son, he claimed him *ex jure Romano* or *ex lege Quiritium*, Dig. vi. i. 2.

the historian, the atrocious power of putting his children to death, and of selling them three times in open market, was vested in the father from the earliest times of the republic (*c*). But whatever may have been the case previously, we know that this right was recognised by the Twelve Tables, and continued to be the law for many ages (*d*). We find, however, that long before the reign of Justinian it had been very considerably modified. Bynkershoek is of opinion that the power of life and death in the father began to grow into disuse in the reign of the Emperor Hadrian (*e*), of whom it is recorded that he banished a man for having, while out hunting, killed his son, who carried on a criminal intercourse with his step-mother; and the reason alleged is, *quod latronis magis quam patris jure eum interfecisset;* NAM PATRIA POTESTAS IN PIETATE DEBET, NON ATROCITATE, CONSISTERE (*f*). But it deserves notice that in the same part of the Digest where this passage occurs, a definition is given of those who came

(*c*) Dion. Hal. ii. 27.

(*d*) Dig. xxviii. ii. 11. Cic. pro Domo. §§ 29. 32. Sallust mentions, without remark, an instance of the exercise of this power. *Fuere extra conjurationem complures, qui ad Catilinam initio profecti sunt. In his erat Fulvius, Senatoris F., quem retractum ex itinere parens necari jussit.* Bell. Cat. c. 39.

(*e*) See his Opusculum, *De jure occidendi, vendendi et exponendi liberos apud veteres Romanos.* He says, *Rigorem Juris veteris videntur primum mores subegisse, deinde leges.* Ib. cap. 4. And see also Noodt *De partus expositione et nece apud veteres;* and Heinecc. Syntag. Antiq. Rom. Jur. i. tit. 9.

(*f*) Dig. xlviii. ix. 1.

within the meaning of the *lex Pompeia de parricidiis*, which applied to persons who were guilty of the murder of kinsmen, and almost every kind of relationship is mentioned, except that of children. In his commentary on the law, Marcian points out that the *mother*, who murders her son or daughter, and the grandfather who murders his grandchild, are within its scope and purview, but he makes no allusion to the father (*g*). The inference seems to be, that at the time when Marcian wrote, the murder of a child by its father was not considered a *parricidium*, as the murder of a brother or sister or son-in-law, or step-son was. But by an edict of the Emperor Constantine, such an act of the father was expressly made liable to the punishment affixed to a *parricidium*. The words are, *si quis parentis* AUT FILII . . . . *fata properaverit* . . . . *pœna parricidii puniatur* (*h*). There can, however, be no doubt that even before that period the severity of what has been called by Latin writers the *patria majestas* was much relaxed, and the father's power seems to have become restricted in ordinary cases to the use of moderate corporal chastisement; but where the domestic offence was of a graver nature, he had the right of fixing the punishment, which was to be pronounced by a Judge; although we are not to suppose that even

(*g*) Ib. tit. ix. § 1.
(*h*) Cod. ix. tit. 17.

in that case he could deprive his son or daughter of life (*i*).

§ 3. Towards the mother the Roman law enjoined upon children the duty of showing due reverence and respect, and punished any flagrant instance of the want of it (*k*); but beyond this it seems to have recognised no right or claim on her part. She was not in the eye of that law their natural guardian, even where the father died intestate, leaving them under age; nor could he legally appoint her their guardian by will (*l*). And, in conformity with our own law, the rule was that she had no right to appoint a testamentary guardian, although (unlike our law in this respect) the Roman law did not treat such an act as an absolute nullity, but allowed it to be confirmed after due investigation before the proper tribunal (*m*). We may, therefore, con-

(*i*) Cod. viii. tit. 46, § 3; ix. tit. 15. Heinecc. *ubi supra*. Even at a much earlier period when the power of the father was absolute, he was supposed to exercise it as a judge sitting in a domestic forum and after a formal investigation. For proofs, see Dion. Hal. iii. 22; viii. 79. Val. Max. v. 8. 2. Senec. de Clement. i. 14, 15.

(*k*) Cod. viii. tit. 47, § 4.

(*l*) Dig. xxvi. tit. ii. § 26; tit. iii. § 1; tit. iv. § 6.

(*m*) Dig. iii. tit. iii. § 2. In this respect the Roman law seems to have acted upon the principle, *factum valet quod fieri non debuit*, a principle of questionable propriety and repudiated by the English law. It is a maxim which prevails perhaps in no code more than in that of the Hindus. See Strange's Hindu Law, i. 87.

clude with certainty that no cases, such as are discussed in the following pages relative to the *father's* right, ever occurred in the Roman Courts, for his will was practically absolute, and no amount of cruelty, neglect of duty, or immorality on his part, affected in the slightest degree his claim to the custody of his children. It must be understood that this remark does not apply to *guardians*, for they might be removed for personal misconduct or ill treatment of the minor; and "in many respects, indeed, the Court of Chancery, in the exercise of its authority over infants, implicitly follows the very dictates of the Roman Code" (*n*).

§ 4. In France, by the Code Civil, the authority over infants—whose minority in both sexes there continues until the age of twenty-one—is given exclusively to the father during his life, and after his death the right of the mother accrues (*o*). But the father may appoint, by his will or declaration made before a magistrate or notary, a special adviser to act in conjunction with the mother, without whose concurrence she can perform no act of guardianship. If, however, his right of interference is specially limited, she may act by herself in matters beyond the scope of his authority. The mother is not bound to assume

(*n*) Story's Eq. Jur. § 1350.
(*o*) Code Civil, §§ 373. 389.

the office, but in case she declines doing so, she must fulfil its duties until she nominates a guardian. If she accepts it, and afterwards wishes to re-marry, it is her duty to summon the *conseil de famille*, who will decide whether she ought to be allowed to retain the guardianship. The *conseil de famille* consists of six relatives of the parents—three on the paternal and three on the maternal side—who reside within a certain specified distance of the place where the guardianship is exercised (*p*). If the widow neglects this formality she forfeits all right to the guardianship of her children, and her second husband will be responsible for any previous laches on her part as guardian. But if the *conseil de famille*, when duly summoned, continue her in the office, they are obliged to associate with her as co-guardian the second husband, who thereby becomes responsible for the proper performance of the duties in future.

§ 5. Mr. Chancellor Kent gives the following summary account of the law upon the subject of the custody of minor children as it exists in the United States, and he cites as his authorities the cases collected in the subjoined note (*q*), of which

(*p*) Ib. § 407.

(*q*) *Archer's Case*, 1 Ld. Raym. 673. *Rex* v. *Smith*, Stra. 982. *Rex* v. *Delaval*, 3 Burr. 1434. *Commonwealth* v. *Addicks*, 5 Binney, 520. The case of *M'Dowles*, 8 Johns. Rep. 328. *Commonwealth*

those that have been decided in our own courts will be more fully discussed in the course of this treatise. He says (*r*):—

"The father may obtain the custody of his children by the writ of *habeas corpus*, when they are improperly detained from him; but the Courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere upon *habeas corpus*, and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to judge for itself, and even control the right of the father to the possession and education of his child, when the nature of the case appears to warrant it." He mentions also that by the *New York Revised Statutes* (*s*) the Supreme Court is empowered to award a *habeas corpus* on behalf of the wife when the husband and wife live separate without being divorced, and to dispose of the custody of the minor children in sound discretion; and the Chancellor or a Judge may, upon *habeas corpus*,

v. *Nutt*, 1 Brown's Penn. Rep. 143. *Ozanne* v. *Delile*, 17 Martin's Louis. Rep. 32. *Matter of Woolstonecraft*, 4 Johns. Ch. Rep. 80. *Creuze* v. *Hunter*, 2 Cox's Cases, 242. *De Manneville* v. *De Manneville*, 10 Ves. 52.

(*r*) Commentaries, vol. ii. p. 194, 2nd edit.

(*s*) Vol. ii. p. 148, 149.

recover and dispose of any child detained by the society of *Shakers*. And again, "in consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labour and services. There can be no doubt that this right in the father is perfect while the child is under the age of fourteen years; but as the father's guardianship, by nature, continues until the child has arrived to full age, and as he is entitled by statute to constitute a testamentary guardian of the person and estate of his children until the age of twenty-one, the inference would seem to be that he was, in contemplation of law, entitled to the custody of the persons, and to the value of the services and labour of his children during their minority. This is a principle assumed by the elementary writers, and in several of the judicial decisions" (*t*).

The same learned author also states that in America "the father, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the Courts of Justice may, in their sound discretion, and when the morals or safety, or interest of the children strongly require it, withdraw the infants from the custody of the father

(*t*) Commentaries, vol. 2, 193.

or mother, and place the care and custody of them elsewhere. So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purposes of education" (*u*).

This power of the father ceases on the arrival of the child at the age of majority, which has been variously established in different countries, but in the United States, as in England, it is fixed at the age of twenty-one.

If no testamentary disposition of the guardianship of the child is made by the father "the mother after the father's death is entitled to the guardianship of the person, and in some cases, of the estate of the infant, until it arrives at the age of fourteen, when it is of sufficient age to choose a guardian for itself. In New York, the mother is in that case, by statute, entitled to the guardianship of the estate" (*v*).

§ 6. The general rule of law in this country is, that the legal power over infant children belongs to the father and that during his life the mother has none. In the words of Blackstone (*w*), "a

(*u*) Mr. Chancellor Kent cites the following authorities:—*Matter of Woolstonecraft*, 4 Johns. Ch. Rep. 80. *Commonwealth* v. *Addicks*, 5 Binney, 520. *United States* v. *Green*, 3 Mason, 482. *Case of Wellesley* v. *Duke of Beaufort*, 2 Russ. 1. *The State* v. *Smith*, 6 Greenleaf, 462.

(*v*) Commentaries, vol. ii. 206. New York Rev. Statutes, i. 718, § 5.

(*w*) Comm. vol. i. 453.

mother, *as such*, is entitled to no power, but only to reverence and respect." And irrespectively of the statute 2 & 3 Vict. c. 54, of which the provisions will be hereafter considered, the father has, at common law, a right to the exclusive custody of his child even at an age when it still requires nourishment from its mother's breast. As was said by Mr. Justice Patteson (*x*), "the law is perfectly clear as to the right of the father to the possession of his *legitimate* children of whatever age they may be." And by Mr. Justice Littledale (*y*), "it is the universal rule, with some exceptions, that the father is entitled to the custody of a young child even against the will of the mother. In case of there being no father, then the mother is the person next entitled to its custody" (*z*). What these exceptions are will be considered in the course of the work.

§ 7. It must be admitted that the application of this law which enforces with such jealous care the rights of the father, has often been extremely harsh. He might be a man of the most immoral character, and his conduct towards the mother such as to render it impossible for her, without all sacrifice of dignity and self-respect, to live with him; and

(*x*) *Ex parte M'Clellan*, 1 Dowl. P. C. 34.

(*y*) *Ex parte Glover*, 4 Dowl. P. C. 293.

(*z*) That is, supposing that no testamentary guardian has been appointed by the father. See *post*, Chap. VII.

yet, provided only that he was cautious enough not to bring his children into actual contact with pollution, and did not physically ill treat them, he had the entire control over and disposition of them, and might embitter the life of the mother by depriving her of the society of her offspring. And what untold suffering might she not be called upon to endure, in the mental struggle between the affection which prompted her to submit to insult and injury for their sake, and the desire to escape from such usage by abandoning her home! The Legislature has at last, after much difficulty and opposition, provided a partial remedy for this evil, and, as will be seen hereafter, Courts of Equity are now enabled to make regulations on the subject which take into account the feelings of the mother, and are more in unison with the dictates of humanity (*a*).

§ 8. But "although in general parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection; but whenever this presumption is removed, whenever (for example) it

(*a*) Stat. 2 & 3 Vict. c. 54. *Post*, Chap. VIII.

is found, that a father is guilty of gross ill treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and take care of them, and to superintend their education" (*b*). And to use the words of Lord Hardwicke, L. C., the Court of Chancery " has a general right delegated by the Crown as *parens patriæ* to interfere in particular cases for the benefit of such as are incapable to protect themselves" (*c*).

§ 9. It is unnecessary to discuss the grounds and reasons upon which the jurisdiction of the Court of Chancery, to interfere and remove the persons of infant children from the custody of their parents, is founded. It is sufficient here to say, that it is "a jurisdiction which seems indispensable to the sound morals, the good order,

(*b*) Story's Eq. Juris. § 1341.
(*c*) *Butler* v. *Freeman*, Ambler, 302.

and the just protection of a civilised society" (*d*); and that it is now too firmly established to be shaken or questioned. "The truth is, that in the constitution of the government of England all powers in the administration of justice, which are necessary in themselves, are vested in the Crown; and are so vested to be exercised by those ministers of the Crown to whom the jurisdiction has usually been delegated. The present jurisdiction must be taken to be delegated to the Court of Chancery, whenever there is a suit respecting property in that Court" (*e*).

§ 10. Nor will the Court of Chancery wait until some misbehaviour has actually occurred on the part of parents or guardians, if it has reason to suspect that they are about to act improperly:—in the words of Lord Macclesfield, "preventing justice is better than punishing justice." This *dictum* occurred in a case (*f*) where a petition was presented by some near and noble relatives of the Duke of Beaufort and

(*d*) The reader will find this subject examined at length by the late Mr. Justice Story, with his usual learning and ability, in the 34th Chapter of his Equity Jurisprudence. The following cases may be consulted. *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703. *Whitfield* v. *Hales*, 12 Ves. 492. *De Manneville* v. *De Manneville*, 10 Ves. 59. *Shelley* v. *Westbrooke*, Jac. 266. *Lyons* v. *Blenkin*, Jac. 245. *Creuse* v. *Orby Hunter*, 2 Cox, 242. *Wellesley* v. *Duke of Beaufort*, 2 Russ. 20, 21; 2 Bligh, N. S. 128.

(*e*) Ib. § 1349.

(*f*) *Duke of Beaufort* v. *Perty*, 1 P. Wms. 703.

his brother, Lord Noel Somerset, both infants, praying that the latter, who had been placed by his guardians, appointed under the will of the late Duke, at Westminster School, might be removed to Eton. The Lord Chancellor said, that as the Court would interpose where the estate of a man was devised in trust, so would it *a fortiori* concern itself in the custody of a child being devised to a guardian, who was but a person intrusted in that case, since nothing could be of greater concern than the education of infants. But as no good reason was given for the application in this instance, the Court refused to make any order on the subject.

§ 11. Previously to the passing of the act 2 & 3 Vict. c. 54, the rule was, that the Court of Chancery would only interfere in the case of infants where they were possessed of or entitled to property. "If any one," said Lord Eldon, "will turn his mind attentively to the subject, he must see that this Court has not the means of acting, except where it has property to act upon" (*g*). And in conformity with this principle Mr. Justice Story remarks (*h*), "The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act, at least, where the infant has property;

(*g*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 21.
(*h*) Eq. Juris. § 1338.

for if the infant has no property, the Court will perhaps not interfere. It is not, however, from any want of jurisdiction that it will not interfere in such a case, but from the want of means to exercise its jurisdiction with effect; because the Court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this part of its jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant." These latter sentences are taken from the judgment pronounced by Lord Eldon in the celebrated case of *Wellesley* v. *Duke of Beaufort* (*i*).

Lord Hardwicke also, in the case of *Butler* v. *Freeman* (*k*), already quoted, while he asserted the right of the Court of Chancery in very general terms, added the important qualification, that there *must be a suit depending* relative to the infant or his estate to entitle the Court to this jurisdiction. The occasion on which these remarks were made, was where a minor of the age of eighteen years had been trepanned into an improper marriage, which took place at Antwerp; and, on the petition of the father, the Court ordered that his son should be restored to him, and committed the wife and her brother, who

(*i*) 2 Russ. 1. (*k*) Ambler, 301. *Supra*, p. 13.

had been active in bringing about the marriage, to the Fleet Prison.

§ 12. The same doctrine is implied in which was said by Sir John Leach, V. C., in *Wright* v. *Naylor* (*l*), where a mother had clandestinely taken her infant son away from his guardians, and secreted him, and a petition was presented by them, praying that he might be delivered up to them that they might have the management of him. The infant was entitled to about 500*l.* under the will of his father, and the court said, "In respect of the administration of the property of the infant, the court has jurisdiction over his person. Let the order be made as prayed by the petition." And in *Wellesley* v. *Wellesley* (*m*), in the House of Lords, Lord Redesdale said, that the Chancellor might *perhaps* have exercised the jurisdiction to deprive a father of the custody of his children independent of the cause which had been instituted in the Court of Chancery; but as incident to the cause he apprehended that there could be no doubt of the right to exercise the jurisdiction.

§ 13. The mode in which Courts of Common Law interfere in questions relating to the custody of infants is by writ of *habeas corpus*, which, "in general, lies to bring up persons who are in cus-

(*l*) 5 Madd. 77. (*m*) 2 Bligh, N. S. 137.

tody, and who are alleged not to be legally restrained of their liberty. When the court clearly perceives that they are illegally detained, it will discharge them" (*n*). This part of the subject will be discussed in a subsequent chapter.

(*n*) Per *Littledale*, J., in *Ex parte Glover*, 4 Dowl. P. C. 293.

## CHAPTER II.

### INTERFERENCE OF COURTS OF EQUITY IN QUESTIONS OF PARENTAL CUSTODY.

§ 14. In a preceding quotation from Mr. Justice Story, we have seen that he enumerates examples of the cases in which the Court of Chancery will interfere to prevent the abuse of parental authority; and the determination of that court to do so, where there is property belonging to the infant upon which it can exercise jurisdiction, has been constantly asserted. It was strongly expressed by Lord Thurlow in a case (*a*), where a petition was presented to the court, stating that the father's affairs were embarrassed, that he was an outlaw, and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, and praying that the father might be restrained from taking his son abroad, or improperly interfering with his education: the petition further stated, that the mother lived separate from her husband, and

(*a*) *Creuze* v. *Hunter*, 2 Bro. Ch. Ca. 499, n.; and see *Whitfield* v. *Hales*, 12 Ves. 492.

principally directed the education of her son. The Lord Chancellor ordered that the father should be restrained from interfering with the management of his child, without the consent of two persons nominated for the purpose; and with reference to an objection of counsel, that the court had no such jurisdiction, he said, that he knew there was such a notion, but he was of opinion that that court had arms long enough to reach such a case, and to prevent a father from prejudicing the health or future prospects of the child. He added, that, whenever a case was brought before him he would act upon this opinion. If the House of Lords thought differently, they might control his judgment, but he certainly would not allow the child to be sacrificed to the views of the father.

§ 15. In *De Manneville* v. *De Manneville*, (*b*) an application had been made to the Court of King's Bench for a writ of *habeas corpus*, and this having been unsuccessful (upon grounds which will be hereafter considered), a petition on behalf of the mother and infant, the latter of whom was then eleven months old, was presented to the Court of Chancery, and stated that the mother had married a French emigrant, and her property, amounting to 700*l.* a year, had been settled to

(*b*) 10 Ves. 52. See *post*, Chap. III.

her separate use for life: that differences arose between them, and soon after the birth of their first child, Mrs. De Manneville quitted his house with it, and went to the residence of a friend, leaving a note for her husband, to inform him where he might see the child, and that ultimately he took it away by force. The prayer of the petition was, that the defendant, her husband, might be ordered to produce in court the infant, and that it might be delivered to her, the mother; and in case the court should be of opinion that the infant ought not to be taken from the father, then that he might be restrained from carrying away, or removing the petitioners, or either of them, out of the jurisdiction. The Lord Chancellor, in delivering judgment, adverted to the fact, that here the wife had voluntarily withdrawn herself from the society of her husband. He said, "I must consider the wife at present as living under circumstances, under which the law will not permit her to live (*c*). A very material consideration then arises, whether the child is to be removed to the custody of the mother, not living with the father according to the obligation of the marriage contract, which I am bound to consider existing until I am told by better authority than affidavits, that it ought no longer to subsist."

(*c*) By this expression is meant that the husband might institute a suit in the Ecclesiastical Court against his wife for the restitution of conjugal rights.

The affidavits in support of the petition contains charges against the husband of irreligion and dangerous political principles. With reference to these Lord Eldon said, "As to the political and religious principles of this gentleman there is but an unsatisfactory account upon those topics by the affidavits, if any consideration ought to be called to them. But the view that I take of those affidavits is, as they create more or less probability that he may be removed from this country, and, therefore, that the child may be removed; if it is to follow his person." And upon the state of facts laid before the court, his Lordship added, "Looking at the father's situation, and taking his own representation as to his inclination with regard to this child, upon the affidavits there is a fair suspicion of real danger, that the child may be removed out of this country, and then according to Lord Macclesfield's opinion in the *Shaftesbury case*, the court must act upon that suspicion. Some method must be taken to secure to the court that the person of the child shall remain in this country." An order was therefore pronounced, that the defendant and all other persons should be restrained from taking the child out of the kingdom; and he was afterwards ordered to go before the Master, and give security not to remove the child out of the kingdom.

§ 16. We see, therefore, that Lord Eldon did not consider this a case in which he ought to

deprive the father of the custody of his child, but he carefully guarded himself against the supposition that the conduct of a parent might not be such as to warrant this exercise of authority on the part of the court. He said expressly that in determining such a question, attention must be paid to the way in which a child was likely to be brought up. "Since I have sat here, I removed a child from its father upon considerations such as these. The father was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant, and I thought it not inconsistent with a due attention to parental authority so abused to call in the authority of the king as *parens patriæ*" (*d*). And, on another occasion, the same learned Judge said, "It is certain that the court will interfere against the acts of a guardian, if acting in a manner inconsistent with his duty; and it is equally clear that the court will control a parent if acting in a manner which he should not" (*e*).

§ 17. Let us now consider some instances of interference by the Court of Chancery on account of the conduct or character of the father.

That which may be regarded as the leading authority upon the subject is the well-known case of *Wellesley* v. *The Duke of Beaufort* (*f*), which

(*d*) Ib. 61, 62. (*e*) *Lyons* v. *Blenkin*, Jac. 253.
(*f*) 2 Russ. 1.

was finally decided in the House of Lords (*g*). There the father had married a lady of large fortune, and had by her three children, a daughter and two sons, who were entitled to considerable property under the marriage settlement. He went abroad to avoid his creditors, and while on the continent formed an adulterous connexion with a Mrs. Bligh, in consequence of which his wife separated herself from him, and returned to England, taking with her, by his permission, the three minor children. She commenced a suit in the Ecclesiastical Court for a divorce, but died soon afterwards, and on her death bed committed her children to the care of her sisters, with a request that they would not allow the father to get possession of them. A bill was then filed in the name of the infants by their next friend against the trustees of the settlement, praying the usual accounts, and that a proper person might be appointed to have the care of their persons during their minorities. The father in the meantime returned to England, and presented a petition, in which he prayed that the aunts of his children, in whose custody they were, might, on a day named, deliver over the infants to him. During all this period the adulterous intercourse between Mrs. Bligh and the father continued, and heavy damages had been recovered in an

(*g*) *Wellesley* v. *Wellesley*, 2 Bligh, N. S. 124.

action for *crim. con.* brought by the husband against the latter.

When the petition came on for hearing, affidavits and letters were read which made out against Mr. Wellesley, the father, a case of the most profligate and immoral conduct. It was alleged that he had treated his wife with unkindness; that he lived in undisguised adultery; that he encouraged his sons to swear, and caused even his daughter to repeat profane and indecent language. In a letter addressed by him to the tutor of his sons he said, "there are certain things which ought to be let alone; a man and his children ought to be allowed to go to the Devil their own way, if he pleases."

In the course of an elaborate judgment, Lord Chancellor Eldon cited, with approbation, the opinion of Lord Macclesfield, already quoted, where he said that "if he had a reasonable ground to believe that the children would not be properly treated he would interfere, upon the principle that *preventing justice* was preferable to *punishing justice*."

Lord Eldon also said, "I am not called upon to say what would be the consequence of the mere act of adultery on the part of the father. I will give no opinion upon that, because it may be attended with so many circumstances, or it may be unattended with so many circumstances as quite to alter the character of a case. Nor is it

necessary that I should give an opinion upon the subject of drunkenness, as there is no such imputation in this case. At the same time I have no difficulty in saying, that if a father be living in a state of habitual drunkenness, incapacitating himself from taking care of his children's education, he is not to be looked upon as a man of such reason and understanding as to enable him to discharge the duty of a parent, and if such a case were to occur again, as it has occurred before, the court would take care that the children should not be under the control of a person so debased himself, and so likely to injure them."

§ 18. In this case Lord Eldon thought the facts connected with the adultery so gross that he emphatically declared that he ought to be hunted out of society, if he hesitated for a moment to say that he would sooner forfeit his life than permit the girl to go into the company of such a woman, or into the care and protection of a man who had the slightest connexion with that woman. The result was that the Lord Chancellor made an order referring it to the Master to inquire to what person or persons willing, *other than the father*, to undertake the same, the custody of the infants should be committed, and restraining the father from removing them from the custody in which they then were without the permission of the court.

§ 19. Against this order an appeal was presented to the House of Lords (*h*); but the judgment of the Lord Chancellor was unanimously affirmed.

In delivering his opinion on that occasion Lord Redesdale put the following case: "A lady who had high expectations might marry a person of the lowest and most profligate description, and her son might, after her death, be entitled to great property, and might also be a peer, the father being a person of the most abandoned description, of the worst education, the most improper person to have any care or direction of the management of that son; and is the doctrine to be endured, that there does not exist in this country a jurisdiction to control the power of the father in such circumstances? I deny that the law ever considered that he has such a power; it has always considered it as a trust. Look at all the elementary writings on the subject; they say, that a father is entrusted with the care of the children; that he is entrusted with it for this reason, because it is supposed his natural affection would make him the most proper person to discharge the trust."

§ 20. In the above case there was every probability that the father would bring his infant

(*h*) *Wellesley* v. *Wellesley*, 2 Bligh, N. S. 124.

daughter into contact with his mistress; indeed, Lord Eldon assumes this in his judgment, although he certainly adds, that he would not allow the girl to be under the care and protection of her father, if he "had the slightest connection with that woman." But this latter proposition must be received with caution, for the courts of equity repudiate interference where the father, however immoral his conduct may be, has sufficient sense of decency not to bring his children into contact with the person with whom he has formed a vicious connection. And, as will be shown hereafter, precisely the same distinction is recognised and acted upon in the courts of common law.

The following case was in Equity (*i*).—A petition was presented by a mother and daughter (the latter being about fourteen years of age) praying that the daughter might be placed under the mother's care, she offering to maintain her at her own expense, or that the mother might have access to her daughter at all convenient times; and it appeared that the father was living in habitual adultery with another woman, on account of which the mother had obtained a divorce in the Ecclesiastical Courts. The Vice Chancellor (Sir J. Leach) said, "This court has nothing to do with the fact of the father's adultery, unless

(*i*) *Ball* v. *Ball*, 2 Sim. 35.

the father brings the child into contact with the woman. All the cases on the subject go upon that distinction, when adultery is the ground of a petition for depriving the father of his common law right over the custody of his children."

The counsel for the petitioners admitted that there was no proof that the father had actually brought his daughter into contact with his mistress, but they urged that at all events liberty of access should be granted to the mother. It appeared on affidavits that the child formerly lived with her mother, and was at times allowed to go to her father; but on one occasion, the father, without any communication with the mother, detained his daughter, and sent her to a school, and the mother was ignorant for a long time what had become of her child, and when after great difficulty she found out the school, the mistress refused to allow her to see the child except in her presence. It was further stated, that the child, when living with her father, had no society except that of a female servant of all work, and that the father's conduct was so gross and violent towards the mother when she went to him to inquire after her daughter's residence, that it was dangerous for her to be in his presence. The question pointedly put under these circumstances on behalf of the mother to the court was this:—"Is a child of fourteen years to be deprived, by the brutal conduct of the father, of the company,

advice, and protection of a mother, against whom no imputation can be raised?"

The Vice Chancellor, however, while he admitted that in a moral point of view he knew of no act more harsh or cruel than depriving the mother of proper intercourse with her child, stated that he felt bound to say that in this case there did not appear to him to be sufficient to deprive the father of his common-law right to the care and custody of his child. He considered that the question resolved itself into one of authorities, and he knew no case which would authorize him, upon the facts as they appeared, to make the order sought in either alternative. And he mentioned two cases of a similar nature (*k*), in which Lord Eldon had refused petitions precisely similar. The petition therefore was dismissed.

§ 21. It is to be observed, that here there was no cause between the parties in court other than the matter arising out of the petition itself; nor does it appear that there was any property to which the child was entitled, and upon which the Court of Chancery could exercise its jurisdiction. If this had been the case, perhaps on account of the general conduct of the father the decision might have been different, and the court might have acted upon the intimation thrown out by

(*k*) *Smith* v. *Smith* and *Gallini* v. *Gallini* not elsewhere reported.

Lord Eldon, when he said, that he "apprehended that the jurisdiction which he had upon a *habeas corpus* was exactly the same as if it was before a Judge, and that a Judge attended to nothing but cruelty, or personal ill-usage to the child, as a ground for taking it from its father. *But where there was a cause in court there were many other considerations*" (*l*).

§ 22. In a very recent case a petition was presented in the Court of the Vice Chancellor of England by a mother, Mrs. Warde, praying that the custody of her five minor children might be given up to her, on the ground that their morals were likely to be corrupted by remaining with their father. It appeared that in consequence of the immoral conduct of her husband she had obtained a decree for a divorce from him in the Ecclesiastical Court, and alimony to the amount of 1200*l.* a year was awarded, the property in settlement at the marriage being very considerable. The case was heard before the Vice Chancellor in his private room, who decided against the petition, and said, that the rule of the court in matters of this kind, as laid down in various cases, was, that personal misconduct on the part of the father was not of itself sufficient to deprive him of the custody of his children, which nature and the law gave him. To support such an

(*l*) Note (*b*) to *Lyons* v. *Blenkin*, Jac. 254.

application it must be shewn that there had been an attempt by the father to poison the minds of his children, or, at any rate, that they were subjected to scenes calculated to undermine their morals. Nothing, however, had been proved in evidence before him (the Vice Chancellor) further than that the father had been guilty of conduct highly immoral and justly to be reprehended; but at the same time it must be borne in mind that such misconduct of his had been carried on in so secret a manner that his wife had only been apprised of it a short time before coming to this court. Under these circumstances, as there was no proof that the children had been improperly brought up by the father, or that any of his irregularities had been suffered to reach the children, the Vice Chancellor thought that the rule of law which prevented the court from interfering between father and children, where the moral delinquencies of the parent were concealed from the children, must prevail, and he ordered the three eldest children to be given up to the father. At the same time he said, that he considered the conduct of the mother to be irreproachable, and directed that the two youngest children, who were of tender age, should remain with her; but with respect to the others, he considered himself bound by the rule of law, which he approved, and which said that a child should not be deprived of a father's protection so long

as there existed no proof of its being liable to contamination by remaining with him (*m*).

The mother appealed against this order to the Lord Chancellor, and fresh affidavits were filed, which disclosed gross immoralities on the part of the father, and shewed that he was bringing up his children in a way calculated to demoralize them, especially the eldest, a girl ten years of age.

While this appeal was pending, Mrs. Warde presented a second petition, stating her belief that Mr. Warde intended to withdraw both himself and children out of the jurisdiction of the court, and praying for an order to prevent his taking such a step. The Lord Chancellor made an order upon this petition, restraining Mr. Warde from taking the children out of the country pending the other petition.

In giving final judgment, the Lord Chancellor said that since the decision of the court below, fresh evidence had been furnished of such a nature that he felt convinced that, if it had been before the Vice Chancellor at the time of giving his judgment, he would have come to a different conclusion. From the evidence as it now stood, it was plainly to be seen that the conduct of Mr. Warde, in the neighbourhood in which he resided, was of such an objectionable and notorious cha-

(*m*) This case is not reported, but the judgment of the Lord Chancellor was given Jan. 20th, 1849.

racter that no modest woman dared to approach him, and at the same time there was too good reason to suppose that he was living with a person of improper conduct. Mr. Warde's own statement respecting this woman was, that he hired her at Brighton in the menial capacity of servant, but that he had afterwards for her usefulness promoted her to the office of housekeeper. Now, it appeared from the affidavits that this person was the only companion of the eldest Miss Warde, and in fact that she regularly took her seat at the table with the family, and in addition, it was alleged that it was not an uncommon practice for Mr. Warde, his daughter, and this woman to be seen walking about the grounds, all three of them with cigars in their mouths. Now, the habit of smoking was at all times and by all persons bad enough, but it became truly disgusting when practised by a young lady of her station in life, who, it was stated, had a large store of cigars by her for her own use. From all these disclosures it was pretty plainly to be inferred that this person was not living with Mr. Warde in the capacity of either cook or housekeeper. It next became important to look to the evidence respecting the education of Miss Warde; now, although there were statements that she was under various masters to learn the ordinary accomplishments of young ladies, there was not a single allegation that her religious or moral

education was looked after. On the other hand, observations of Mr. Warde had been deposed to with a view of proving that he was not a religious character, and, although he had undoubtedly denied the truth of such statements, still he had done it in such a way as to leave the question, whether the inference drawn from his words was not substantially correct, altogether untouched, and the court would be more inclined to put credence in the statements of Mrs. Warde and her brother than in those of Mr. Warde. With such evidence before him of the grossly immoral conduct of Mr. Warde, and taking into consideration the great probability that he was now carrying on an improper intercourse with this woman, who was the only person to give Miss Warde any moral or religious instruction, he (the Lord Chancellor) felt bound to declare that Mr. Warde was unfit to have the custody of his daughter, and that she must be given up to her mother. With respect to the question of the other two children, at present with their father, he was of opinion that it was at all times better that children should not be brought up separately. If, unfortunately, it became necessary that they should lose the protection of one of their parents, it was far better that all the children should be brought up together than that half should be educated to side with the father, and the other half with the mother. Without, therefore, ex-

pressing any opinion, whether the conduct of Mr. Warde was such as to disentitle him to the custody of his son, his Lordship said that he should direct that all the three children should be given up to Mrs. Warde or to some other person appointed by her, upon the service of the order.

§ 23. Whatever difficulty there may be in defining the degree of latitude which will be allowed to opinions in matters of religion, before the Court of Chancery feels itself justified in interfering to protect infants from the poison of infidelity, it is quite certain that where a father avows himself an atheist, or ridicules and blasphemes the Christian religion, he will be deemed an unfit person to have the custody of his children, and will (if they have property upon which the jurisdiction of the court can be exercised,) be restrained from getting possession of or intermeddling with them. With reference to such a case, Lord Eldon said that he should not be justified in delivering the children over to the custody of a father who deemed it his duty to recommend to them the adoption of conduct in some of the most important relations of life as moral and virtuous which the law considers as immoral and vicious (*n*).

But on another occasion, where the father,

(*n*) *Shelley* v. *Westbrooke*, Jac. 266.

who claimed possession of his children, as against their aunt, who detained them from him, was an *Unitarian*, the same learned Judge granted the application, and laid down the general rule to be observed in such cases by saying, " with the religious tenets of either party I have nothing to do, *except so far as the law of the country calls upon me to look on some religious opinions as dangerous to society*" (*o*).

§ 24. Let us next consider whether, even if there be no ground for interference with paternal control on account of immoral conduct on the part of the father, there may not be other causes or circumstances which will justify the Court of Chancery in removing his minor children from his custody.

And first, it may, I think, be laid down that mere insolvency or poverty is not such a cause. Although a provision should be made for infants from a fund in which he is not entitled to participate, and he is unable to support them adequately out of his own means of livelihood, yet he cannot *on that account only* be compelled to part with the care and superintendence of his children, in order that they may enjoy the bounty of others (*p*). And it is reasonable that the law

(*o*) *Lyons* v. *Blenkin*, Jac. 256.

(*p*) *Kilpatrick* v. *Kilpatrick*, Reg. Lib. 1828, A. fo. 2106; Macpherson on Infants, Part 1, p. 142, 143.

should be so; for, as was said on one occasion by Lord Chancellor King, "it cannot be conceived that because another thinks fit to give a legacy, though never so great, to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me—that of being their guardian" (*q*). A father, against whose character there is no imputation, seems to have an undoubted right to exercise an option whether he will or will not surrender the education and custody of his child to others, in order to secure for it certain pecuniary advantages. But a bequest to the father, on condition that he will allow his infant to be committed to the care of trustees appointed under the will, which provides a fund for its maintenance, will not, even if there is no gift over, be held to be *in terrorem* only, and he must renounce the legacy if he refuses to comply with the condition, and insists upon retaining the infant under his own care (*r*).

§ 25. Admitting however the general rule to be

(*q*) *Ex parte Hopkins*, 3 P. Wms. 152. If, however, an infant is entitled to an estate, and the father enters upon it, and applies the rents and profits to his own use, being himself in insolvent circumstances and regardless of the interests of the infant, the Court of Chancery will appoint not exactly a guardian, which cannot be during the father's life, but a person to act as guardian of the estate and person of the infant. *Ex parte Mountfort*, 15 Ves. 445.

(*r*) *Colston* v. *Morris*, Jac. 257, n. (11); and see *Potts* v. *Norton*, 2 P. Wms. 110, note.

as stated in the preceding part of the last section, there is an important exception to be noticed; namely, that the father will not be permitted in such a case first to encourage expectations in his children, by allowing them to receive maintenance and education for a time out of the fund provided for them, and afterwards turn round and deprive them of the *continuance* of those advantages, by asserting his paternal right to have the control and management of them himself. By his previous conduct he has given an implied, if not an express assent to their participation in the benefit of the pecuniary provision; that assent has been acted upon, and it is too late for him afterwards capriciously to withdraw it. He has, as it were, estopped himself from so doing, having, as was said on one occasion by Lord Hardwicke, "waived his parental right" (*s*).

By attention to this distinction we may reconcile various judicial dicta of Courts of Equity, which at first sight seem to conflict. For instance, that which has been already quoted of Lord King, and the following of Lord Eldon, that "it is always a delicate thing for the court to interfere against the parental authority; yet we know that the court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit" (*t*); and, "will the

(*s*) *Blake* v. *Leigh*, Amb. 307.
(*t*) *Lyons* v. *Blenkin*, Jac. 262.

court permit a parent, who cannot educate his child in a manner suitable to the property which the child derives from the bounty of another, to withhold from it the education to which it is entitled?" (*u*)

§ 26. These expressions were used in a case which clearly illustrates the principle upon which the Court of Chancery acts, and the judgment of Lord Eldon so fully explains the distinction here pointed out, that it is given at some length. It will be found to contain a summary of the law on this part of the subject. The facts were these: A grandmother had by will devised lands, and given legacies to her three granddaughters, whose father was living, and empowered her daughter, their aunt, to manage the property during their minority, and pay and apply such part thereof, as to her should seem reasonable and proper, towards their maintenance and education. She also appointed her their guardian (*v*) and executrix of the will. It should be stated that the father had previously committed the three children to the care of their grandmother, the testatrix, and the expenses of their education had been defrayed by her. After

(*u*) Ib. 254.

(*v*) This was done of course under a mistake of law; for no guardian could be appointed while the father was alive, as Lord Eldon notices in his judgment. Ib. 261. Nor indeed could a grandmother, under any circumstances, appoint a legal guardian.

her death they continued to reside in the same manner under the care of their aunt, who subsequently married; but by the provisions of her marriage settlement reserved to herself the management of her nieces and their fortunes. About this time differences arose between her and their father, who filed a bill against her and her husband for accounts of the fortunes of the infants, insisting that they should be placed under his care, and that, as he was not of ability to maintain them, a proper sum should be allowed to him for that purpose. At this period the infants were of the ages of nineteen, fourteen, and twelve respectively, and their father was a dissenting minister of limited means, formerly a Baptist, but latterly an Unitarian. He had obtained a writ of *habeas corpus*, directed to the aunt and her husband, and when the argument on the return to the writ took place, Lord Eldon thought that the best mode of deciding the question would be to have a short petition presented;—at the same time saying that the jurisdiction in such cases was to be very carefully exercised. A petition was accordingly presented by the father, praying that the infants might be restored to him, and the result was that his application was refused. The Lord Chancellor, in delivering judgment, said—

" The view I have taken of the case is of this sort. Here is a fund provided for the maintenance and education of these children, and I think

I am properly warranted by authorities in asserting that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, *allowing them to be brought up with expectations founded upon a particular species of maintenance and education*, which he himself cannot afford to give them, he is not (unless I greatly mistake the matter), according to the principles of this court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that too at a period approaching to maturity of age. He is not at liberty to say, I will alter the course of education of my children, by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had; and in consequence of which their views in life are very different from what they would have been without it."

The Lord Chancellor afterwards added, "Nobody can doubt that *if I give a provision to your child, it does not give me or any one else a right to control your care of her; not at all;* but, on the other hand, if when she is young I was to give her a considerable maintenance during her infancy, which you could not have supplied, and a

large fortune afterwards, and you, the father, permit her to take the advantage of that education, which could not have been afforded but through my gift, could you afterwards stop short and say, that she should no longer have that advantage? Under such circumstances the court would inquire what was most for her benefit."

An application was afterwards made on the part of the father for a rehearing, which was granted, and the case was in part re-argued; but while it was still *sub judice* a motion was made on the part of the aunt to dismiss the bill, on the ground that the suit did not appear to be for the benefit of the infants.

This was refused by the court, and the case was not finally disposed of until the eldest of the infants had attained the age of twenty-one, and married.

Lord Eldon persisted in his refusal to remove the children from the custody of their aunt, and stated his reason as follows: "The circumstance that decides me about not removing the children is this, that although the testatrix could not impose the terms of appointing a guardian where the father was living, yet the father, by his consent, might enable the guardian to act, and by his consent it appears that he has enabled the guardian to act, and by such consent these children have, with very little interruption, continued under the care and guardianship of the aunt.

All their habits have been acquired under the roof of their aunt—all their connections have been formed under their aunt; and it appears to me that the father has so far given his consent to this course of education, as to preclude him from saying that he shall now be permitted to break in and introduce a new system of education, which cannot be consistent with the system to which they have been habituated, and where so much depends upon the quantum of supply for the purpose which the discretion of this lady may lead her to apply, if the testatrix has left her the discretion of regulating the means for their education."

The learned Judge also said, "It therefore does appear to me that the testatrix, by the benefits she has given these children out of her property, has purchased the power of educating them in the way, and under the control and guardianship, which she has pointed out, *and the parent has consented to*, and I cannot help thinking that unless this gentleman can bring before the court some complaint on the ground of improper conduct, he must be taken to have given his consent to the course of education which has been pursued."

§ 27. It is important to attend to the exact words used by Lord Eldon in these passages, for otherwise an erroneous view may be taken of the

rule which he there lays down. It was the conduct of the father, in apparently acquiescing in the terms of the bequest, and permitting his child to be brought up conformably thereto, during a period sufficiently long to induce and encourage in its mind expectations of a considerable fortune, which was held to prevent him from afterwards depriving the infant of the designed benefit. On another occasion Lord Eldon said, that "the court would not, in general, permit the father to disappoint the expectations of his children" (*w*).

§ 28. And this seems to have been the principle which governed the opinion of Lord Thurlow in the case of *Powell* v. *Cleaver* (*x*). There an uncle left by will to his nephew, a minor, whose father was alive, property on the express condition that certain trustees named in the will should have the care and guardianship of the nephew during his minority. The father allowed his son to enjoy for some time the benefits of the education provided for him by the trustees under the uncle's will, but a dispute afterwards arose whether the guardianship ought to be in the father or the trustees of the will. Lord Thurlow said, "Lord Bathurst decided a case where there

(*w*) *Anon.* Jac. 254, n. (*b*), and see *Potts* v. *Norton*, 2 P. Wms. 110, n. *Blake* v. *Leigh*, Amb. 306.

(*x*) 2 Bro. Ch. Ca. 499.

was a Roman Catholic father, to whose son there was an estate given by a Protestant. It is no where laid down that the guardianship of a child can be wantonly disposed of by a third person. The wisdom would be not to raise points on such a question, as the court will take care that the child shall be properly educated for his expectations. It must be laid before the court how the son is now disposed of." Upon this point, however, nothing further occurs in the report of the case.

§ 29. In the two following cases there does not appear to have been any consent on the part of the father, beyond what might be implied from the fact of his previous non-interference. The court, however, would not allow him, being without any ostensible means of support to deprive his infant children of the benefit of proper maintenance and education by taking possession of them himself. A man had been outlawed and was living abroad in very embarrassed circumstances, but on his return to this country, was about to remove his son, who was eleven years of age, from the school where he had been placed by his mother, and carry him abroad (*z*). The mother presented a petition to the Court of Chancery to prevent this being done. And upon the undertaking of cer-

(*z*) *Creuze* v. *Hunter*, 2 Cox, 242; 2 Bro. Ch. Ca. 500, n.; Reg. Lib. A. 1789, fo. 456; Jac. 250.

tain parties approved of by the court that they would provide for and superintend the infant's education, it was ordered that he should be placed under their care, and that the father should be restrained from removing his son from the school and situation in which he was then placed, and from carrying him abroad out of the jurisdiction of the court, and from using or employing any means for that purpose.

A decision similar in effect to this was pronounced by the Commissioners of the Great Seal in 1792 (*a*). A petition had been presented by four infants and their mother, praying that it might be referred to one of the Masters to approve of a proper person to have the care of their persons and superintendence of their education during the minority of the former, and that the father might be restrained from removing them from the schools and situations where they were then placed. It appeared that the father had become bankrupt, and a legacy of 2000*l.* having been left to the wife, the assignees proposed that 1000*l.* should be paid to them, and the residue settled to the separate use of the wife for her life, and after her decease in trust for the children. Affidavits were also sworn, which stated, that the father, by his cruel behaviour to his wife, had compelled her to exhibit articles of the peace against him. He had not any settled

(*a*) *Ex parte Warner*, 4 Bro. Ch. Ca. 101.

place of abode, and was wholly unable to provide for his family; and he threatened to remove his children from the schools where they had been placed by their mother and her relatives, and take them into his own custody. It was also alleged that he was a very unfit and improper person to have the care and management of his children. Upon these facts the court decreed, that an order should issue as prayed by the petition.

§ 30. It is to be observed, however, that in both these instances there were other circumstances beyond the mere facts of the father's insolvency and previous non-interference, which may have influenced the court in its decision. In the one case the father had been outlawed, and was about to carry his infant son abroad out of the jurisdiction, an act which the Court of Chancery has always most properly viewed with great jealousy and disfavour, as will be more fully shown hereafter. In the other, there was an allegation that the father was a very unfit and improper person to have the care and management of his children. How far this may have weighed with the court does not appear, but it would be unsafe to conclude that had there not been these additional facts, unfavourable to the claim of the father in either case, his right to the custody of his children would have been interfered with.

§ 31. But although acquiescence on the part of the father, whereby his children have been enabled for a time to enjoy the benefits of the bounty of others, is thus held to operate as a kind of estoppel, and prevent him from depriving them of those benefits, yet it seems that a mere prospective engagement on his part to allow his children to live apart from him under certain circumstances, will not be binding upon him. Thus in the case of husband and wife, where a deed had been executed, whereby the former had covenanted, in the event of a separation between them, to permit their children to reside with the latter, and to be educated under her care and superintendence, the Court of Chancery, upon a return made to a writ of *habeas corpus*, which had been issued on the petition of the father, ordered that the infants should be delivered up to him, although the contemplated separation had taken place, and the infants were of tender years, the one being five years, and the other only seven months old (*b*).

The nature also of the provision made for the infants must be taken into account. To use the words of Lord Eldon, there have been in all such cases of interference solid considerations, and not merely expectations. There has been some immediate irrevocable provision, by which the child could be brought up in a manner suitable to its

(*b*) *Earl and Countess of Westmeath*, Jac. 251, n. (*c*).

future property. The court has then said, that it would not permit the father wantonly and capriciously to deprive the child of that benefit.

The occasion on which these remarks were made was where a petition had been presented to the Court of Chancery by the mother of some infants, who was living apart from her husband, and was possessed of considerable property, settled to her separate use (*c*). The income of the husband was small, and the prayer of the petition was that the infants might be placed with her, or that it might be referred to the Master to approve of a plan for their education, and to appoint a proper person to have the care of them, the mother offering to provide for their maintenance out of her separate income. She also prayed that the father might be restrained from taking them out of the jurisdiction. It was urged, in support of the petition, that the father's income was not sufficient to enable him to give the infants an education suitable to their condition in life and to their expectations, and that it would therefore be for their benefit that their mother's proposal should be granted. The Lord Chancellor, however, refused the application, on the ground that the provision mentioned was a mere offer; but he added, that his decision was without prejudice to any other application or proposal which might be made in case of any permanent provision

(*c*) *Anon.* cited Jac. 264, n. (*a*).

being made for the infants. Moreover, as they were wards of the Court, the father must be restrained from taking them abroad, or depriving the mother of such access to her children as was necessary to keep alive in them feelings of obedience and affection towards her.

The father afterwards received an appointment abroad, which required him to be absent from this country for several years, and he petitioned the court for leave to take the infants with him. He stated that he was desirous of being reconciled to his wife, and it appeared that he had with that view made some overtures to her which she had declined; and his Lordship ultimately ordered that the father should be at liberty to take the infants abroad with him, undertaking to bring them, or such of them as should be living, back with him; and he was half-yearly to transmit, properly vouched, to be laid before the court the plan of tuition and education for each of the infants, actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided.

§ 32. Where the father was dead and the mother resided abroad, and a large sum of money was settled upon their infant daughter, upon condition that she should remain under the care of the settlor, or of such person as he should approve, until she attained the age of twenty-one,

it was referred to the Master to consider whether it would be proper to appoint the settlor to be guardian of the infant, taking into consideration the effect of the settlement (*d*).

§ 33. The general result of the authorities cited and commented upon in the present chapter seems to be this: the Court of Chancery will, where there is property on which it can exercise an effectual jurisdiction, interfere to prevent the abuse of parental authority, and to protect the interests both moral and pecuniary of infants. It will for that purpose deprive a parent of the custody of his child, if he pollutes its mind by bringing it into the presence of and contact with vice. But although in one sense, if his conduct is immoral, he may be said to do this whenever he associates with the infant himself, something more is meant by the terms *presence and contact.* They imply that the child is allowed to live with or visit the paramour of the parent. The court will also interfere, where a father treats his child with cruelty, or is given to habits of gross drunkenness, or professes atheism, or educates it in principles destructive of morality and the well being of society—but not where his opinions are merely those of some recognised form of dissent. Furthermore, if property be settled upon an infant, upon condition that the father surrenders

(*d*) *Fagnani* v. *Selwyn*, Jac. 263.

his right to the custody of its person, and he by acquiescing for a time and permitting the child to be educated in a manner conformably to the terms of the gift or bequest, encourages in it corresponding expectations, he will not be allowed to disappoint them by claiming possession of the infant.

It must be borne in mind however, that by stat. 2 & 3 Vict. c. 54, which will be considered in a separate chapter, a larger discretion is now vested in the Court of Chancery, with respect to the claims *of the mother*, than was deemed to be within its power when the cases were decided which have been here discussed.

# CHAPTER III.

## INTERFERENCE OF COURTS OF COMMON LAW BY WRIT OF HABEAS CORPUS.

§ 34. In Courts of Common Law the question of custody arises chiefly on returns to writs of *habeas corpus*, which are directed to parties, who have possessed themselves (improperly, as it is alleged) of the persons of infants, and who are called upon to show cause why they detain them (*a*). And the production in court of a letter from a daughter to her mother, who was separated from her husband, in which the daughter complained that she was kept by her father in his house, and by him severely used, has been deemed sufficient to justify the grant of a *habeas corpus*, returnable immediately, to compel the

(*a*) "On a writ of *habeas corpus* being applied for by the father to have the children restored to him in the Court of King's Bench, that court inquires whether they are wards of the Court of Chancery, and whether there are any proceedings in that court respecting them. If the Court of King's Bench finds there are such proceedings it declines to grant the writ." Per Lord *Manners*, in *Wellesley* v. *Wellesley*, (Dom. Proc.) 2 Bligh, N. S. 142. See *R.* v. *Isley*, 5 Ad. & Ell. 441. *Post*, section 43.

father to produce his daughter in court in order that she might be examined (*b*).

§ 35. The distinction between the powers of a Court of Common Law and those of a Court of Equity in this matter is pointed out by Lord Redesdale in the following passage (*c*):—

"The care of the person to protect from violence belongs to the Court of King's Bench, but the care of the person with respect to education does not belong to the Court of King's Bench, and the Court of King's Bench disclaims any such right: therefore as to the care and protection for the purpose of education, it belongs to this Court (of Chancery) which has exercised the jurisdiction." The same view of the matter was taken in *Ex parte Skinner* (*d*), in the Common Pleas, by Best, C. J., who said, "in cases of similar applications to the Court of King's Bench, they generally refer the parties to a Master in Chancery, who may ascertain whether there is suffi-

(*b*) *Archer's case*, 1 Ld. Raym. 673. The report designates the daughter as *Mrs.* Eleanor Archer, which might convey the idea that she was a married woman; but it is well known that at that period (the reign of Wm. 3), it was common for unmarried ladies to be addressed with that prefix to their names. No mention is made in the report of an affidavit in this case, and in a note, Holt, C. J. is stated to have said "without doubt a *habeas corpus* may be granted upon the sight of a letter." But at the present day it seems that an affidavit would be required.

(*c*) *Wellesley* v. *Wellesley* (Dom. Proc.), 2 Bligh, N. S. 136.

(*d*) 9 Moore, 278.

cient property to provide for the support of the child or whether it might be made a ward of that court, or he might appoint a guardian to take care of it; and that therefore appears to me to be the wisest and proper course; at all events, our authority can only be co-equal with that of the Court of King's Bench. But the Court of Chancery has a jurisdiction as representing the king as *parens patriæ*, and that court may accordingly, under circumstances, control the right of a father to the possession of his child, and appoint a proper person to watch over its morals and see that it receives a proper education; and if a sum equivalent to its maintenance can be obtained, the Lord Chancellor will order it to be done without inquiring where the funds are to come from."

Lord Eldon also observed in an anonymous case, which was privately heard before him (*e*), that where the infant was a ward of the court, there were many circumstances to which he could give attention which could not weigh with him on a *habeas corpus* alone, without any cause in court. He said also, that he apprehended that the jurisdiction which he had upon a *habeas corpus* was exactly the same as if it was before a Judge (*i. e.* a common law Judge) (*f*), and that

(*e*) Reported Jac. 254.

(*f*) On this point, see *Crowley's case*, 2 Swanst. 1; Com. Dig. Habeas Corpus (A), and Stat. 31 Car. 2, c. 2, § 2, 3.

a Judge attended to nothing but cruelty or personal ill usage to the child, as a ground for taking it from its father. But where there was a cause in court there were many other considerations to be attended to, as in the case then under discussion, where an aunt of the children had made an appointment in their favour, which she would not continue if they resided with their father. The Lord Chancellor proceeded to say, that he could not attend to that circumstance on a writ of *habeas corpus*, but in a cause it might have some weight.

§ 36. We see that Lord Eldon here states that a Judge at common law, in considering the question, whether an infant shall be taken from the custody of its father or not, does not attend to anything as a ground for such removal except cruelty or personal ill usage to the child. But we shall find that this is too limited a rule, unless we give the words "cruelty or personal ill usage" a wider sense than that which they usually bear, and make them embrace cases of moral contamination; for a well founded apprehension that a female infant, for instance, will by residence with its father be exposed to moral pollution, is sufficient to deprive him, at common law, of the right to the custody of his child. The proof of this will sufficiently appear as we proceed.

§ 37. The rule that prevails in cases where the writ of *habeas corpus* is applied for was stated by Lord Mansfield to be as follows (*g*): "The court is bound *ex debito justitiæ*, to set the infants free from an improper restraint; but they are not bound to deliver them over to any body, nor to give them any privilege." Here we see it laid down that the delivery of an infant into the custody of any party is discretionary with the court, although it is bound to release it from an improper custody. In other words, that the court feels itself compelled to act so far as to determine what is an improper custody, and to relieve against it; but not to go further, and select a custos or guardian for the child. It will, however, be shown hereafter, that in later times a different view has been taken by our common law Judges of their obligations in this matter, and they have not deemed themselves restricted to so imperfect an exercise of authority, as merely to set the infant free from improper restraint, without determining into whose hands its custody ought to be committed (*h*).

§ 38. The facts of the case, in which Lord Mansfield laid down the above cited rule were these (*i*):—Ann Catley (the daughter of a coach-

(*g*) *R.* v. *Delaval*, 3 Burr. 1436.
(*h*) *R.* v. *Isley*, 5 Ad. & Ell. 441. See *post*, section 43.
(*i*) 3 Burr. 1434; 1 W. Bl. 409, S. C.

man) was apprenticed by her father, at the age of sixteen years, to Bates, a music master, for seven years. When she was about nineteen years old, she formed a criminal connection with Sir Francis Delaval, and as Bates threatened to turn her out of doors, Sir Francis took a lodging for her mother, and furnished it, the music master allowing her 25*l.* a-year for her board, and it being agreed that he should have her earnings as a public singer. Afterwards Sir Francis obtained a general release from Bates to the girl, and her father and she agreed that she should bind herself apprentice to Sir Francis for the residue of the seven years, and he covenanted to instruct, or cause her to be instructed, in the art of music. The father, however, applied to the court for a criminal information against Delaval, Bates, and the attorney employed to prepare the last-mentioned indenture, for a conspiracy to debauch his daughter, and also for a *habeas corpus* directed to Delaval to bring up the body of the infant. This the latter did, and the court discharged the girl out of his custody. Her father then attempted to seize her in court, but was not permitted, and he was reprimanded by Lord Mansfield for the contempt. Ann Catley then declared her attachment to Sir Francis, and her unwillingness to go home with her father, upon which the Solicitor General applied to the court to protect her from

any violence *redeundo*. But as it was plain that she intended to continue her cohabitation with her seducer, the Court hesitated and said, that *such protections depended upon the circumstances of the case*. "Sometimes we go so far as to send an officer with the parties home (*k*), at other times we only protect in the face of the court. It may or may not be proper for a father to have the custody of his child under age, till arrived at years of discretion. In the present case he seems to have assigned over his parental authority to Bates, the master, by the indenture of apprenticeship" (*l*). It was then ordered that cause should be shown on a subsequent day against the information, and that in the meantime no person should molest the girl on pain of being committed.

When cause was shown, it appeared that the conduct of the minor was so thoroughly vicious that the court declared they had no hopes of reclaiming her, and the only question was, whether any temporal crime had been committed deserving the interposition of the court. They thought that both the father and mother were originally parties to the ruin of their daughter, although now the former appeared as the prosecutor of the information.

(*k*) See *R.* v. *Clarkson*, 1 Strange, 445.

(*l*) Compare *Ex parte Earl of Westmeath*, Jac. 251, note (*c*), and *R.* v. *Mead*, 1 Burr. 542. *R.* v. *Winton*, 5 T. R. 89.

The result was, that they refused actively to interfere, and Lord Mansfield said, "In the present case, upon the circumstances, we think it very improper for her to go to her father. He used her ill before she was apprenticed, and by the indenture has parted with all his parental authority (*m*). She must be discharged, and of course will have her privilege *redeundo;* but I will not interpose in any extraordinary manner."

This decision seems to have proceeded upon two grounds: first, the vicious propensities of the daughter, and, secondly, the depraved conduct of the father. On account of the former, the court had no hopes that by changing the custody the girl would be reclaimed, and the father had disentitled himself to any remedy at the hands of the court by having been a party to his daughter's dishonour.

§ 39. The right of the father was strongly asserted by the Court of King's Bench in the case of *R.* v. *De Manneville* (*n*), (which afterwards came before the Court of Chancery, as has been previously noticed) (*o*), and it must be admitted that it presents some features of peculiar hardship. The affidavit upon which a writ of *habeas corpus* directed to the defendant to bring up the

(*m*) As to the question of emancipation of infants for the purposes of settlement under the Poor Law, see *R.* v. *Inhabitants of Scammonden*, 8 Q. B. 349.

(*n*) 5 East, 221.

(*o*) *Supra*, p. 20.

body of an infant, his daughter eight months old, was obtained, stated, that he was a Frenchman, and had married the mother of the child, an Englishwoman, by whom he had this only child. That she, not long after their marriage, had separated herself from him, on account, as she alleged, of ill treatment, and kept the child whom she was nursing with her. That in the night time the defendant found means, by force and stratagem, to get into the house where she was, and had forcibly taken the child then at the breast, and carried it away almost naked in an open carriage in inclement weather, with a view, as the mother apprehended, of taking it out of the kingdom. This last allegation, however, with respect to taking the child abroad, was proved to rest on no sufficient foundation. There were affidavits contradicting the other statements, but the court would not allow them to be read, and Lord Ellenborough, C. J., observed, that as the ground of removal out of the kingdom was done away, it lay on those who applied for the writ to show that the father was not entitled to the custody of the child. Afterwards, in delivering judgment, the Lord Chief Justice said, "We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the court will protect the child; but there is no

pretence that the child has been injured for want of nurture, or in any other respect. Then he having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him."

In the course of argument reference was made to *Litton's case*, which came before the court in 1781, on an application for a *habeas corpus* by the mother to bring up the body of a child who had been placed at school, from whence it had been taken by its father. There had been articles of separation, by which the father had bound himself to let the mother have access to the child, and Lord Mansfield said, that the court could not at any age take a child from the father; but that as he had constrained himself, by the articles to let the mother have access (*p*), if he chose to take the child home, he must provide for the access of the mother to it there.

In *R.* v. *De Manneville*, Lawrence, J., mentioned that since *Lytton's case*, an application of the same sort had been made by Sir W. Murray to obtain possession of a child of five years old, which the mother kept from him. There Lord Kenyon had no doubt but that the father was entitled to have the custody of the infant, unless the court saw reason to believe that he intended to abuse his right by sacrificing the child, which was suggested to be his motive for getting pos-

(*p*) See *Ex parte Earl of Westmeath*, Jac. 251, n. (*c*).

session of it. Sir W. Murray had been divorced from the mother, and there was not, as it was alleged, any reason to think that the child was his, though born before the divorce. But the court did not think that a sufficient ground to deny him the custody of it.

§ 40. In *Blisset's case* (*q*), which came before Lord Mansfield, a writ of *habeas corpus* had been obtained by the father to recover possession of his female child, who was about six years old, and resided with her mother. The latter at the time was living separate from her husband, on account of his ill treatment of her (*r*); and it was alleged that the child was likely to receive an improper education from her father, and was not well used by him. He had also become a bankrupt. Lord Mansfield said, "If the parties are disagreed, the court will do what shall appear best for the child; fix on a boarding school, and the court will have no objection; let the child in the mean time stay, so that the rule may be made with the concurrence of the family. The natural right is with the father; but if the father is a bankrupt, if he contributed nothing for the child or family, and if he be improper, for such conduct as was suggested at the Judge's

(*q*) Lofft. 748.

(*r*) See the observations of Lord Eldon, in *De Manneville* v. *De Manneville*, 10 Ves. 59. *Supra*, p. 21.

Chambers, the court will not think it right that the child should be with him."

But it is necessary to call attention to the observations of Patteson, J., upon this case. In *Ex parte McClellan* (*s*), that learned Judge said, "That case (*i. e. Blisset's*) was doubted a great deal by the Court of Common Pleas in the case of *Ex parte Skinner* (*t*), an infant, in which the court doubted its authority so to interfere." The report, however, of *Ex parte Skinner*, does not state any expression of doubt on the part of the court as to the authority of *Blisset's case*. The exact words there used by Best, C. J., were the following, and they contain the only allusion that was made to the decision of Lord Mansfield:—"I was referred to *Blisset's case*, and it certainly is extremely strong to show, that the power of assigning the custody of a child brought before the Court of King's Bench was discretionary, if the father appeared to be an improper person to take it; and I therefore thought that the most prudent course would be to assign it over to the care of a third person, and which was acceded to by both its parents. But it now appears that the father has removed the child, and has the custody of it himself; and no authority has been cited to show that this court has jurisdiction to take it out of such custody for the purpose of delivering it over to the mother."

(*s*) 1 Dowl. P. C. 85. (*t*) 9 Moore, 278.

The distinction therefore that seems to be here taken is this: so long as the infant is not in the custody of its father, the court will, under certain circumstances, prevent him from obtaining possession of it; but if he has already got possession of the child, the court will not interfere to take it from him, at least unless there be apprehension of ill treatment or moral contamination by him.

§ 41. In some cases, even where in a moral point of view, the conduct of a father has been very unfavourable to his right to the custody of his children, it has been notwithstanding upheld. Thus, in *R.* v. *Greenhill* (*u*), the mother had separated herself from her husband on account of the open and avowed adultery of the latter with another woman; and she had taken away with her her three children, females, aged respectively five years and a half, four and a half, and two and a half, to the house of their maternal grandmother, where they were residing at the time when Mr. Greenhill obtained a writ of *habeas corpus*, commanding his wife to produce the bodies of his three children before Patteson, J., at his house. It was stated on affidavits, and not denied by Mr. Greenhill, that when he obtained the writ he was living under a feigned

(*u*) 4 Ad. & Ell. 624; and see *In re Pulbrook*, 11 Jur. 185. *In re Fynn*, 12 Jur. 713, and note at p. 720.

name with a woman who passed as his wife at a lodging in London, and that he acknowledged that the adultery was still continuing. It was also stated that he could at any time have, and had, in fact, had, access to the children where they then were. The grandmother deposed, that if the children were placed with their father there was great probability that they would be brought into contact with a female of an abandoned and profligate character. Mr. Justice Patteson, after taking time for consideration, ordered that the children should be delivered up to their father. The order was made a rule of court, but Mrs. Greenhill refused to give up the children, and a rule *nisi* was obtained for an attachment against her, for a contempt. She, however, in the same term, obtained a rule *nisi*, calling upon Mr. Greenhill to show cause why the order of Patteson, J., should not be set aside, and the rule, making it a rule of court, discharged. The matter thus came before the court. It should be mentioned also, that Mrs. Greenhill had already instituted proceedings (which were then depending) in the Ecclesiastical Court for a divorce and alimony.

Affidavits were put in on behalf of Mr. Greenhill, in which he stated that he had offered, if his wife would forgive him, to live with her wherever she wished, and to give up his adulterous connection, but without success; that the children,

if taken out of his custody, would lose materially by family arrangements, which, to his knowledge and belief, would essentially affect their future interests; that his wife had no means of supporting them; that the children, if separated from him, would, as he believed, be brought up in detestation of him, and that his mother was a very proper person to be entrusted with them; that he never contemplated for a moment depriving his wife of the privilege she had as a mother of seeing her children, and had repeatedly expressed himself to her to that effect; that he had never taken either of his children near to his mistress's residence, or his mistress to his own house, or any other place where his wife or children were, nor had he entertained the thought of bringing his wife or children in contact with her. It was afterwards sworn by Mr. Greenhill that he believed that Mrs. Greenhill had taken the children with her out of the kingdom.

On the part of the mother it was said, that she was willing to abide by any direction of the court which might leave her access to her children. Upon this Lord Denman, C. J. remarked, "The children are not in court; nor have we any certainty that the order we might make would be complied with."

The court ultimately discharged the rule obtained by Mrs. Greenhill, and thus decided that the father was entitled to the custody of the

children. Lord Denman said, "There is in the first place, no doubt, that when a father has the custody of his children, he is not to be deprived of it except under particular circumstances; and those do not occur in this case; for, although misconduct is imputed to Mr. Greenhill, there is nothing proved against him which has ever been held sufficient ground for removing children from their father: here it is impossible to say that such danger exists. Although there is an illicit connexion between Mr. Greenhill and Mrs. Graham, *it is not pretended that she is keeping the house to which the children are to be brought* (*v*), or that there is anything in the conduct of the parties so offensive to decency as to render it improper that the children should be left under the control of their father. And he promises the same conduct with respect to them for the future. The present rule was not granted because the court entertained much doubt, but from a desire to avoid increasing the misfortunes of this family" (*w*).

(*v*) See, however, *Ex parte Skinner*, 9 Moore, 278, where the affidavits stated that the infant, six years of age, was living with the mistress of the father, and that "she took the child to him every day;" and yet the court decided that they had no authority to interfere, "and more particularly so, as there was no charge of ill treatment by the father." Ib. 282. But *quære*, whether the law would be so laid down now?

(*w*) During the debate in the House of Lords (July 18th, 1839) on the Custody of Infants' Bill, Lord Denman, C. J. said, "In the case of *The King* v. *Greenhill*, which had been decided in 1836, before himself and the rest of the Judges of the Court of King's Bench, he believed that there was not one Judge who had not felt

§ 42. In the course of the argument in this case, *R.* v. *Dobbyn* (*x*), was cited on behalf of the mother. But the proceedings there terminated in an agreement between the parents who disputed the possession of their child, to abide by the decision of a barrister appointed by the court. It is, however, so far important, as it shows that it is not sufficient for the father merely to establish his strict legal right, where there is such conduct on his part as imperils the morals of his child. The reasons alleged by the wife for not giving up her daughter, who was aged six years, to the care of the father were, that his time was principally devoted to the gaming-table, and the society of women of infamous character; that he was of a brutal disposition, and had attempted the life of his wife, desiring the woman with whom he lived to turn her out of doors, and declaring that she was not his wife but his discarded mistress.

The way in which the matter came before the court was, by the refusal of the wife to make any return to a writ of *habeas corpus*. She was ac-

ashamed of the state of the law, and that it was such as to render it odious in the eyes of the country. The effect in that case was, to enable the father to take his children from his young and blameless wife, and place them in the charge of a woman with whom he cohabited." See Hansard's Parl. Deb. vol. 49, (3rd series), p. 493. But according to the report of the case, the court thought that there was no evidence that the children were likely to be brought into contact with the father's mistress. If the fact had been so, the decision would probably have been very different.

(*x*) See note (*a*) to *R.* v. *Greenhill*, 4 Ad. & Ell. 644.

cordingly arrested, and was asked by the court whether she would undertake to appear before a Judge at Chambers, and bring her daughter with her: but this she declined to do. She was then examined upon interrogatories, and reported in contempt. By consent, the sentence was postponed until the following term, and in the meantime, the result was as above mentioned. We may not unreasonably infer that the court was unwilling, in a case of such palpable profligacy on the part of the father, to assist him in getting possession of his daughter; and by the terms of the order referring the decision of the question to a barrister, the latter was to determine in whose custody the infant should be permanently placed, and to regulate the access to be had to her by both or either of the parents (*y*).

§ 43. We have noticed the *dictum* of Lord Mansfield, that a Court of Common Law is "not bound to deliver an infant over to any body, nor to give it any privilege;" but it will appear

(*y*) At the end of this case (Ib. p. 645) there is added a short note of another, *R.* v. *Wilson*, decided in Hilary Term, 1829. It is, however, too briefly stated to be of much authority. The case is as follows:—"Wife and child, daughter of three years old, brought up by *habeas corpus* sued out by the husband; the wife was asked if she was, under any restraint; and she was told she was at liberty to go where she pleased; and it was referred to the Master to determine at what time and in what manner, and under what circumstances, the father should have access to the daughter; she in the meantime to remain with the mother."

from the following comparatively recent case (*z*), that this doctrine is not quite correct, and that when a clear right appears, the court does feel itself imperatively called upon to enforce that right, and deliver up the infant to the proper and legal custody. Two persons, named Gregory and Wilkins, had been appointed trustees under the will of Benjamin Harris, the father of two infant children; and he bequeathed to them all his real and personal estate upon trusts for the benefit of those children. The will contained the following clause:—"I appoint the said S. Gregory and W. Wilkins executors of this my last will and testament, and also guardians of the persons and estates of my children; and I earnestly request that my said trustees and executors will, according to their discretion cause my said children to be properly brought up and educated." The children at the time of their father's death were in the custody of J. and G. Isley, their maternal grandfather and grandmother, who refused, when required by the trustees, to give them up; on the ground, that on the death of their mother, five years previously, they had come from America, at the testator's written request, for the purpose of taking care of the children, who were placed under their charge, and had continued with them ever since; and that the father had declared his intention never to remove them so

(*z*) *R.* v. *Isley*, 5 Ad. & Ell. 441.

long as they were kindly treated. The infants were aged respectively six and nine years, one of them weak in intellect, and both delicate in health and requiring much care.

The guardians obtained a writ of *habeas corpus* (returnable before a Judge at Chambers) commanding J. and G. Isley to bring up the bodies of the infants; and stated in their affidavit that the grandfather and grandmother were very improper persons to have the custody of the children, as they moved in a sphere of life below that to which the expectations of the latter entitled them to aspire: J. Isley had described himself in his affidavit as a "carpenter."

When the parties attended before Patteson, J. at Chambers, the learned Judge, after having taken time for consideration, stated that he felt so much difficulty in the case, that he thought the question ought to be referred to the court in the following term. Shortly afterwards, Isley, the grandfather, and next friend of the children, filed a bill in Chancery on their behalf, against the executors under the will for an account; and also for the purpose of placing the children and their property under the protection of that court. To this the executors put in an answer, before the matter came before the Court of King's Bench.

It was therefore urged that no proceeding for the purpose of changing the custody ought to be entertained, while a bill in Chancery was depending which involved that very question. Lord

Denman, C. J., asked if there was any prospect of a speedy decision in Chancery; but no answer was given, except by referring to the affidavit, which mentioned the fact of the bill having been filed. The court then made an order that the defendants should deliver up the bodies of the children to the guardians.

In delivering judgment Lord Denman, C. J., said, "Although we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained, we think we ought not to make a delay, which might appear like tampering with the rights of the guardians. We have, I think, no choice as to the course we should pursue, but must order the children to be delivered up to them."

And *per* Littledale, J., "I am of the same opinion. A guardian appointed as these are is in the same situation as a parent. We must enforce the right of the guardians, unless we could see that the will was made in a manner contrary to the real wish of the testator. But it appears that his intention in fact was to remove the children in the manner which the will points out. If we saw reason to expect a decision in Equity on the point, our course of proceeding might be different." And Patteson, J., added, "I was not satisfied at Chambers, nor am I yet, that the father really intended the custody of his children to be changed. But I think we have no choice as to our mode of proceeding."

§ 44. It appears then that the Courts of Common Law will put in force the remedial writ of *habeas corpus* on behalf of infants, whenever they are satisfied that they are subject to any illegal or improper restraint; and cruelty or personal ill usage on the part of parents or guardians will be deemed a sufficient ground for their interference. They will also, like the Court of Chancery, protect infants against moral contamination arising from a vicious connection formed by either parent, limiting themselves, however, to cases where that connection is kept up in the presence of the child. As to general misconduct on the part of the father, it must be very gross before they will interfere (*z*). And although it was laid down by Lord Mansfield that a Court of Common Law is not bound to deliver an infant, when set free from illegal restraint, over *to any body*, in later times it has been held that where a clear right to the custody is shown to exist in any one, the court has no choice, but must order the infant to be delivered up to him. But even where the application is made by the father, if the order made is simply that the infant shall be discharged from the custody in which it is kept at the time, he will not be allowed to take forcible possession of his child in the presence of the court, or *redeundo* from it.

(*z*) *In re Pulbrook*, 11 Jur. 185. *In re Fynn*, 12 Jur. 713.

# CHAPTER IV.

## QUESTION OF CUSTODY WHERE THE INFANT IS ILLEGITIMATE.

§ 45. LET us now see what has been laid down as the law governing the case of *illegitimate* children, bearing in mind the *dictum* of Mr. Justice Patteson, that "the law is perfectly clear as to the right of the father to the possession of his *legitimate* children" (*a*).

On one occasion, Willes, C. J., said (*b*), "He would give no opinion whether the father has any power over a child, who is *nullius filius*; Grotius says truly, that the mother is the only certain parent; and an order of justices to remove the mother always removes the child."

In *R.* v. *Soper* (*c*), Lord Kenyon, C. J., said that the putative father of a bastard child had no right to the custody of it. And when this case was cited in *R.* v. *Moseley* (*d*), where a writ

(*a*) *Ex parte M'Clellan*, 1 Dowl. P. C. 84. *Supra*, p. 11.

(*b*) *Hulland* v. *Malkin*, 2 Wils. 126; 1 Bott. P. L. pl. 556 (6th edition).

(*c*) 5 T. R. 278.

(*d*) 5 East, 224; and see *R.* v. *Hopkins*, 7 East, 579, and 1 Madd. Ch. Pr. 432, n. (*z*).

of *habeas corpus* was moved for to bring up the body of a bastard infant, of which the defendant was the father, the same learned Judge said, "Where the father has the custody of the child fairly, I do not know that this court would take it away from him; though I do not mean to impeach the propriety of the case cited. But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before."

§ 46. In a later case, however, the Court of Common Pleas did take away an infant illegitimate child from the custody in which it had been placed by its father, although there was no imputation against him, and ordered it to be delivered to the mother, who was willing and anxious to receive it (*e*). Sir J. Mansfield, C. J., said, "It is not unlikely, indeed, that by granting this application we may be doing a great prejudice to the child, but still *the mother is entitled to the child if she insists upon it* . . . . . The mother must have the child unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother."

It is, however, by no means clear, that such a right on the part of the mother would now be recognised. In *R.* v. *Hopkins* (*f*), Lord Ellen-

(*e*) *Ex parte Knee*, 1 Bos. & Pull. N. R. 148.

(*f*) 7 East, 579; and see *R.* v. *Felton*, 1 Bott. P. C. pl. 531, where Lord Mansfield said, "neither the putative father nor mother had the legal right of guardianship."

borough expressed a doubt whether the court could interfere by a writ of *habeas corpus* on behalf of the mother of an illegitimate child, who had no legal right to the person of the child, the question of guardianship belonging to another forum, and the child not being of an age to complain for itself of any illegal restraint on its person. As however the infant had been taken away from the mother by force, the court ordered it to be restored to her.

§ 47. The same difficulty was felt and expressed in the following recent case:—An illegitimate child, between eleven and twelve years of age, was produced under the care of a female attendant, by the father with whom it resided, in the Court of Common Pleas, in obedience to a writ of *habeas corpus*, and as he made no claim to the custody, the court allowed the infant to choose for herself the party with whom she wished to remain (*g*). In delivering judgment, Tindal, C. J. said, "This is a case of some difficulty, and we cannot help feeling distressed at being obliged to come to a decision upon it. The writ of *habeas corpus* has been obtained by the mother of an illegitimate child, for the purpose of bringing her up from the custody of a party with whom she had been placed by her putative father. The child is now in Court in obedience to the writ,

(*g*) *In re Lloyd*, 3 Man. & Gr. 547.

and appears, as she has been sworn to be, between eleven and twelve years old. *Had she been under seven years of age, the court would have said that she could exercise no discretion;* but she is old enough to choose for herself, and, therefore, we do not feel called upon to exercise a discretion for her. If she is willing to go with her mother, she may, but if she does so it must be her own free will, for no force shall be used."

His Lordship then asked the child if she would go with her mother, but she expressed a strong disinclination to do so. He then told her that she was at liberty to go where she would; whereupon she left the court with the female who had accompanied her there. Upon quitting the court, the mother attempted to take forcible possession of the child; but upon this being made known to the Chief Justice, one of the officers of the court was sent with her for her protection.

§ 48. Two points in this case are worthy of notice. The child was illegitimate, and the father made no opposition to the mother's claim of custody. With reference to the first, it was asked by Maule, J., "Suppose the infant had been brought up at the instance of a stranger; could the court order her to be given up to him? *How does the mother of an illegitimate child differ from a stranger?*" And Tindal, C. J., said, "If this had been a young child,"—by which expression

the learned Chief Justice seems to have meant within the age of seven years,—" I should feel no difficulty, for the case would then fall within *The King* v. *Hopkins*, where the court returned the child to the custody of the mother. But here the child can speak for herself. Suppose she were to say that she would not go with her mother, we could not force her to do so."

In the course of the argument allusion was made to the new Poor Law Act, 4 & 5 Wm. 4, c. 76, § 71, whereby the burden of supporting a bastard child is thrown upon the mother (*h*); but it was observed by Tindal, C. J., that as the child was born previously to the passing of that statute it did not apply; and Maule, J. called attention to the 57th section of the same statute, which enacts, " that every man who from and after the passing of this act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain

(*h*) The following is the section referred to:—" And be it further enacted, That every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: provided always, that such liability of such mother as aforesaid, shall cease on the marriage of such child, if a female."

such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly." The learned Judge then observed, that according to this clause the applicant's *husband* would appear to be the fit person to have the custody of the child (*i*).

§ 49. The same question also arose lately where a putative father had, previously to the birth of his bastard child, given a bond to the churchwardens and overseers of the parish, conditioned to indemnify them and the inhabitants against all costs and charges arising out of the maintenance of the child (*k*). They brought an action on the bond, and the defendant pleaded that he had been always able and willing to keep and maintain the child; that he had requested

(*i*) In making this enactment, the Legislature seems to have been influenced by the maxim, *Qui sentit commodum sentire debet et onus.*

(*k*) *Bownes* v. *Marsh*, 10 Q. B. 787, and see *Richards* v. *Hodges*, 2 Wms. Saund. 83, where the learned editors say, that within the age of nurture, the putative father certainly has no right to the custody of the child.

the churchwardens and overseers to deliver it over to his care and management, but they had refused to do so; and that therefore they had been damnified by their own voluntary act, and in their own wrong. The plaintiffs, in their replication, traversed the request of the defendant, and on that issue the verdict was found for him. Judgment was then moved for *non obstante veredicto*, on the ground that it was not alleged that the child was willing to go to and be maintained by the putative father, and that the latter was not entitled in law to the custody of his bastard child for the purpose of its care and management, without its consent thereto, which consent was not alleged in the plea. On the part of the defendant it was contended that, as against the parish officers, the putative father had a right to the custody of his child, and that if they persisted in keeping and maintaining the child contrary to his request, they maintained it by their own voluntary act, and in their own wrong. Upon this it was observed by Coleridge, J., that the argument seemed to assume some relation between the father and child beyond what the law acknowledges in the case of illegitimacy. The case was, however, decided in favour of the defendant, on the ground, that as the plea alleged that the child was under the power and control of the plaintiffs, and they refused to deliver her over to the defendant

according to his request, the plaintiffs had no right to assume, after verdict, that the child was unwilling to go to the defendant; and, if the child was indifferent and passive, the facts in the plea showed that the defendant did not suffer and permit the child to be maintained by the parish; he did not suffer and permit that which was contrary to his express request.

§ 50. The court here did not determine the point, whether or not the putative father had a right to insist upon having his child given up to him for the purpose of maintaining it; but in the course of the argument it seemed to throw doubt on the affirmative of that proposition; for Coleridge, J., said, "The question here is, whether, when a child is beyond the age of nurture, the parish officers are bound to give it up to the putative father, from whom they have taken a bond to maintain it. Suppose the case of a father whose conduct is notoriously infamous?" In two former cases, however, of old date, this right on the part of the father as against the parish officers was certainly recognised by the court (*l*); and, at a later period, Chief Justice Lee and two other Judges declared their opinion, that the putative father of a bastard child had a right to maintain it himself, although, in the

(*l*) *Burwell's case*, 1 Ventr. 48; *Sherman's case*, Ib. 210, (temp. Car. 2).

same case, Foster, J., doubted, and said, that "In his opinion there would be danger of bastard children dying for want of care, or of their being murdered (*m*), if all the putative fathers of such children could take them from the officers of the parishes where they were born, and carry them where they please" (*n*).

There seems to be much force in this observation, and perhaps it will be found, when the point is expressly raised, that the courts will adopt the view, which negatives the *right* of the putative father. It would, however, be hard to make him liable for expenses incurred by the parish, if he is willing to maintain the child himself, and there is no valid ground for impeaching his character or ability. In that case it would seem, that if the parish officers refuse to allow him to have the custody of the child, in order to support it, they can have no claim upon him for reimbursement. But if he is a man of bad character, and one to whom it would be unsafe to entrust the child, then the parish officers might reply that fact to such a plea as was pleaded in *Bownes* v. *Marsh* (*o*), and it would seem to be a sufficient answer, so as, if proved, to entitle them to a verdict.

(*m*) As to cases where want of proper care amounts to murder, see what is said in *Urmston* v. *Newcomen*, 4 Ad. & Ell. 905.

(*n*) *Newland* v. *Osomond*, Sayer, 93 (temp. Geo. 2).

(*o*) *Supra*, p. 81; and see *R.* v. *Felton*, 1 Bott. Pl. 531. *Strangeways* v. *Robinson*, 4 Taunt. 498.

§ 51. Where property is left by a putative father to his illegitimate children, and the Master has, under an order of the Court of Chancery, approved of a guardian for them, the court will not allow the mother to remove them, in order that they may reside with her; but will provide that she shall have reasonable access to them, while the care of their education and maintenance is entrusted to the guardian (*p*). The same provident regard for the interests of infants has been shown, by ordering that the representative of the deceased *mother* of an illegitimate child should have free access to it, although the putative father retained the custody and had the care and superintendence of it (*q*). And although a father cannot, under stat. 12 Car. 2, c. 24, appoint a testamentary guardian or guardians for his natural children, yet if he nominates persons in his will to whom he wishes the guardianship of them to be intrusted, the Court of Chancery will in general appoint those persons to the office, provided they are not objectionable on account of their character or circumstances (*r*).

§ 52. By the statute 4 & 5 Phil. & M. c. 3, s. 2, it

(*p*) *Courtois* v. *Vincent*, Jac. 268.

(*q*) *Ord* v. *Blackett*, 9 Mod. 116; see also *Hunter* v. *Macrae*, 5 Hill's MSS. 46; Macpherson on Infants, 112.

(*r*) *Peckham* v. *Peckham*, 2 Cox, 46. *Ward* v. *St. Paul*, 2 Bro. Ch. Ca. 583. See *Ex parte Glover*, 4 Dowl. 291; Com. Dig. Guardian, (E) 2.

is made unlawful for any person to take or convey away any maid or woman child, unmarried, being under the age of sixteen years, "out of or from the possession, custody, or governance, and against the will of the father of such maid or woman child;" and by the third section, if any person takes or conveys such maid or woman child, unmarried, out of or from the possession, and against the will of the father *or mother*, *or of such person* as shall by lawful means have the order, keeping, education, or governing of such child, he is to suffer the punishment of imprisonment or fine. Upon the construction of this statute it has been held, that it applies to the case of an illegitimate daughter under the care of her putative father (*s*). Indeed, it was said by one of the Judges who concurred in that decision, that "The putative father of a natural child has a natural right to the care and education of it;" but from the other authorities that have been cited it appears that this dictum is incorrect. The true ground of the judgment was that, without his consent, the maiden was taken out of the possession of a person having, by lawful means, the government and education of her, which, by the third section, is made an illegal act.

(*s*) *R.* v. *Cornfort*, 2 Stra. 1162, and S. C. (more fully), in 1 Bott. Pl. 513.

# CHAPTER V.

## WHERE FORCE OR FRAUD HAS BEEN USED TO GET POSSESSION OF INFANTS.

§ 53. With reference to the remedy by writ of *habeas corpus*, and the question, whether there must have been some force or improper restraint previously used, in order to authorize the court to remove an infant from the custody of a party, it is necessary to bear in mind an important distinction. Where the application is made to take away the child from any one *except the father*, it is not a necessary preliminary to show that force or restraint is employed; but there must be some illegal force or improper restraint on the part of the father, in order to enable the court to take away the infant *from him* (*a*). It was stated by Mr. Justice Patteson in 1831, that there was no instance of the Queen's Bench having taken the custody of the child from the father, on the ground merely of improper instruction (*b*). And no such case has occurred since that time. The

(*a*) *Ex parte M'Clellan*, 1 Dowl. 84.
(*b*) Ib. 85.

proper court to apply to in order to compel a father to perform his duty towards his children, as was said by the same learned Judge, is that of Chancery. It has, however, been previously shown, that in certain cases where the morals of the infant are contaminated, or where it is subjected to personal ill-usage, the Common Law Courts will interfere.

§ 54. But, on the other hand, it is necessary to bear in mind the rule which prevails as to the mode in which a father is justified in getting possession of his infant child. It was laid down by Lord Chancellor King (*c*), that the father having the undoubted right to the guardianship of his own children, if he can any way gain them, he is at liberty to do so, provided no breach of the peace be made in such an attempt; but the children must not be taken away by him on returning from, any more than coming to, the court, and it will be a contempt in any person offering to do so. And in exact conformity with this principle Lord Eldon said (*d*), "That a man has a right to the custody of the person of his wife; in general, also, to that of his child; but he must not pursue a legal object by illegal means, as by force of arms, or a conspiracy to do it by force of arms; and though the object is most

(*c*) *Ex parte Hopkins*, 3 P. Wms. 154.
(*d*) *De Manneville* v. *De Manneville*, 10 Ves. 62.

legitimate, he may become very criminal by the means used to attain it" (*e*).

§ 55. We see that in the two last cited *dicta* of learned Judges, the improper means which are specified as vitiating the father's attempt to obtain the custody of his infant child, are *force of arms* and *breach of the peace*, and the same doctrine has been laid down in cases of illegitimate children, where resort has been had to *fraud*. Thus where a putative father, on whom an order of filiation has been made, got possession of the child, three years old, by fraud, Lord Kenyon, C. J., said, "That he had no right to the custody, and the infant was accordingly restored to its mother" (*f*). This case was followed up by another some years afterwards, in which the same learned Judge upheld the same doctrine, and said (*g*), "Where the father has the custody of the child fairly, I do not know that this court would take it away from him; though I do not mean to impeach the propriety of the case cited (*R.* v. *Soper*). But where he has got possession of the child by *force or fraud*, as is here suggested, we will interfere to put matters in the same situation as before."

(*e*) A conspiracy to effect a legal purpose with corrupt intent or by improper means, is an indictable offence. See *R.* v. *Delaval*, 3 Burr. 1435. *R.* v. *Jones*, 4 B. & Ad. 345. *R.* v. *Seward*, 4 Ad. & Ell. 713. (*f*) *R.* v. *Soper*, 5 T. R. 278.

(*g*) *R.* v. *Moseley*, 5 East, 224, n. (*a*).

§ 56. In illustration of this rule, may be cited the case of *R.* v. *Hopkins* (*h*), where the mother of an infant bastard child applied for a writ of *habeas corpus*, directed to the defendants to bring the child before the court in order that it might be restored to her. It appeared upon affidavits, that the defendants first obtained possession of the infant by stratagem and pretence, but soon afterwards restored it to the mother, from whom it was again taken "by force by Mrs. Hopkins and two soldiers," when it was little more than two years old. Lord Ellenborough, C. J., after some hesitation whether the court could interfere *on behalf of the mother of an illegitimate child, who had no legal right to the custody of its person*, especially as the child, on account of its tender age, was incapable of complaining of any illegal restraint, granted the writ; but on the special ground that improper means had been resorted to for the removal of the infant from its mother. He said, "It appears that the mother of the child, so called, had it in her quiet possession, under her own care and protection, during the period of nurture. That she was first devested of her possession by stratagem, and after recovering it again, was afterwards dispossessed of it by force. In such a case everything is to be presumed in her favour. Without touching, therefore, the question of guardianship, we think

(*h*) 7 East, 579.

that this is a proper occasion for the court, by means of this remedial writ, *to restore the child to the same quiet custody in which it was before the transactions happened* which are the subject of complaint; leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle."

It will be observed how cautiously this decision is worded: it proceeded upon the principle that a Court of Law would not sanction a forcible proceeding to obtain what might *possibly* be the right of a party; but the question of right was left undecided and even untouched, and the writ was granted, as in the case of *R.* v. *Moseley* (*i*), already cited, merely to put matters "in the same situation as before."

§ 57. In the three last cited cases, the infants whose custody was disputed were illegitimate, and as the father in such cases cannot be said to have any legal right to the custody at all, it may be doubted whether the same doctrine as to the use of force or fraud applies to the father of legitimate children. The rule, however, as limited by Lord King and Lord Eldon, namely, that the means employed must be legal and not involve a breach of the peace, is certainly true to this extent, that a father may render himself

(*i*) 5 East, 224, n. (*a*). *Supra*, p. 89.

liable to an indictment by the mode in which he tries to get possession of his legitimate children. But even in such a case it by no means follows that the court will interfere to take his children away from him when he has once got possession of them. This appears from an anonymous case, cited by Sheppard, Serjt. *arguendo*, in the case of *Strangeways* v. *Robinson* (*k*), where he said, that he had once attended as counsel on behalf of a mother on a writ of *habeas corpus* before Lord Kenyon, C. J., to prevent a legitimate child, little more than seven years old, from being carried to the West Indies by his father; but though the father had obtained the possession of the child from a school, *both by fraud and force*, and though Lord Kenyon would have preferred rather to have left the child in the custody of the mother, yet he held, that as he found it in the possession of the father, he must there leave it.

(*k*) 4 Taunt. 506.

# CHAPTER VI.

## LIBERTY OF CHOICE ALLOWED TO INFANTS IN QUESTIONS OF CUSTODY.

§ 58. The next question to consider is, how far any discretion or liberty of choice is permitted to infants with regard to the person to whom their custody is to be committed. And first, as to the practice of the Court of Chancery.

It was once argued at the bar, before Lord Hardwicke, that very little weight should be paid to the inclination of infants, for that it would be very dangerous if they were allowed to have the nomination of their guardian: in such a case a scholar might apply to the court to change his school as not liking it (*a*). The occasion of this argument was where a father had appointed a female guardian of his daughter, who, being above the age of sixteen, withdrew herself and presented a petition complaining of ill usage and severity on the part of the guardian. The latter was willing to renounce all further interference with the infant, but in conjunction with all the other rela-

(*a*) *Anon.* 2 Ves. Sen. 374.

tions, wished her to reside with and be under the care of a Mr. Tracy, who was himself a relation. The young lady, however, desired that a Mr. Hexeter, who was merely a neighbour and no relation, might be the person. The choice was referred to the Master, who reported in favour of Mr. Hexeter, chiefly in consequence of the great disinclination expressed by the infant against going to Mr. Tracy. On exception to the report the Lord Chancellor said, that as this was not a question whether the court should remove a testamentary guardian or not, but only with whom the infant should reside, and who should have the personal care of her education, she being a young lady near seventeen, he thought that weight should be laid on the inclination of the infant, and as there was no imputation against Mr. Hexeter, the exception was disallowed. It was ordered, however, that the person concerned in her withdrawing should not have access to her, and that she should not be married without leave of the court.

In the course of his judgment, Lord Hardwicke said, with reference to paying regard to the wishes of the infant; "In so doing, I ought to go a little farther than even the law does; for supposing there was no testamentary guardian, nor a mother, if the infant has any socage land, and is of the age of twelve, if female; of fourteen, if male; they are allowed to choose their guardians,

as is frequently done on circuit, and is the constant practice, and what this court frequently call on infants to do; though this still is liable to any reasonable objection made to such choice."

§ 59. In the following case it will be seen that this liberty of choice on the part of the infant has been to a certain extent respected even against the father. In the time of Lord Chancellor King, a Mr. Hopkins, who died unmarried and childless, left to each of his three nieces, who resided with him, a considerable sum of money, to be severally paid to them on their respectively attaining the age of twenty-one or marrying, provided that the marriage was with the consent of his three executors (*b*). One of them was Hopkins, a cousin of the testator, who occupied the house of the latter after his decease and the three nieces continued to live there. Their father (the brother of the testator) presented a petition to the court, setting forth that he had a right to the guardianship of his own children, and praying that they might be delivered over to him. An offer was made to produce an affidavit proving that Hopkins, the cousin, against whom the petition was exhibited, "had been often seen to kiss the eldest niece, and to go into her chamber; and that there was reason to suspect him of some intentions to inveigle her affections in order to a marriage."

(*b*) *Ex parte Hopkins*, 2 P. Wms. 152. *Supra*, p. 38. 88.

At this period the eldest girl was only thirteen years of age. The Lord Chancellor asked the eldest daughter, who was in court, whether she was under any force, and where she would rather be? She replied, that she was not under any force; and that, though she had all imaginable duty for her father and mother, yet her uncle, the testator, having been so kind to her by his will, she thought herself under an obligation to continue where he intended she should, and that she thought it to be his intention she should continue in the house where he himself had placed her. Whereupon the Lord Chancellor dismissed the petition; but directed Mr. Hopkins, who had the young ladies in his custody, to permit their father and mother, at all seasonable times, to have access to and see their children (*c*).

§ 60. The rule that prevails in Courts of Common Law upon this subject was laid down with precision in a case of no distant date, which has been already cited (*d*). There Lord Denman,

(*c*) In a note upon this case, it is stated by Cox, the editor of the 5th edition, that if the parties brought up upon a writ of *homine replegiando* or *habeas corpus*, will acquaint the court, that they are under no force, the court will let them go back to the places from whence they came; or if they appear to be under restraint will set them at liberty, but not deliver them into the custody of another, nor in a proceeding of that nature determine private rights, as the right of guardianship evidently is. See, however, *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103, and *R.* v. *Isley*, 5 Ad. & Ell. 441. *Supra*, p. 72.

(*d*) *R.* v. *Greenhill*, 4 Ad. & Ell. 624. *Supra*, p. 66.

C. J., explicitly stated the law, "because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age." He said, "When an infant is brought before the court by *habeas corpus*, if he be of an age to exercise a choice, the court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the court must make an order for his being placed in the proper custody (*e*). The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father. The court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or of contamination by some gross profligacy." And the following account of the course to be adopted was on the same occasion given by Mr. Justice Littledale. "The practice in such cases is that, if the children be of a proper age, the court gives them their election as to the custody in which they will be; if not, the court takes care that they be delivered into the proper custody. If this were a case in which the father and mother disagreed as to the disposal of the children, and

(*e*) See *supra*, section 43, and *infra*, sections 64, 65.

they were brought from a distant place in the charge of some other person, and each of the parents appeared before the court, and claimed the custody, there is no doubt that the court would give it to the father; the mother's application would not be attended to. Here the case is stronger; the children were, in effect, in the custody of the father, in a place selected by him; they have been removed and he only seeks to bring them back."

§ 61. Another instance in which the court respected the wishes of an infant, who was competent to exercise a sound discretion, occurred in the case of *R.* v. *Clarkson* (*e*), where a man pretending that he was married to a young lady of fortune, obtained a writ of *habeas corpus*, directed to her guardians commanding them to produce her in court. On the return to this writ, it appeared that she had, under her mother's will, been committed to the care of the defendant, who had placed her at a school where she was quite willing to remain of her own accord. When she was brought into court, the Chief Justice (Sir John Pratt), asked her if she desired to be taken out of the hands of the persons she lived with and go with the party who claimed her as his wife. She denied that he was her husband, and desired that she might continue with her guardian. Upon this, it was said *per curiam*,

(*e*) 1 Strange, 444.

that they had nothing to do to order her to go with Dibley, the pretended husband, but only to see that she was under no illegal restraint; "all we can do is, to declare that she is at liberty to go where she pleases; but lest this writ be made use of by Dibley, as a means to get her abroad, and seize her, we will order our tipstaff to wait upon her home to her guardians; and so it was done in *Lady Harriet Berkeley's case.*"

§ 62. Of the case of Lady Harriet Berkeley here referred to, Lord Mansfield subsequently said (*f*) that *R.* v. *Clarkson* bears no resemblance to it, "as the reporter has made the court declare." It occurred in the reign of Charles 2nd, and was an indictment against Lord Grey and others for a conspiracy in carrying away that lady, "then a virgin, unmarried, within the age of eighteen years," out of the custody of her father the Earl of Berkeley, and causing her to cohabit with Lord Grey, he being at the time the husband of one of her sisters. The trial was one at bar, and when the jury withdrew to consider their verdict the following scene took place (*g*).

"*Earl of Berkeley.*—My Lord Chief Justice, I desire I may have my daughter delivered to me again.

*Lord Chief Justice.*—My Lord Berkeley must have his daughter again.

(*f*) *R.* v. *Delaval*, 1 W. Bl. 412. (*g*) State Trials, 9. 183.

*Lady Henrietta.*—I will not go to my father again.

*Justice Holben.*—My Lord, she being now in court, and there being a *homine replegiando* against my Lord Grey, for her, upon which he was committed, we must now examine her. Are you under any custody or restraint, Madam?

*Lady Henrietta.*—No, my Lord, I am not.

*Lord Chief Justice.*—Then we cannot deny my Lord Berkeley the custody of his own daughter.

*Lady Henrietta.*—My Lord, I am married.

*Lord Chief Justice.*—To whom?

*Lady Henrietta.*—To Mr. Turner.

*Lord Chief Justice.*—What Turner? Where is he?

*Lady Henrietta.*—He is here in court.

*Lord Chief Justice.*—My Lord Berkeley, your daughter is free for you to take her; as for Mr. Turner, if he thinks he has any right to the lady, let him take his course. Are you at liberty and under no restraint?

*Lady Henrietta.*—I will go with my husband.

*Earl of Berkeley.*—Hussey, you shall go with me home.

*Lady Henrietta.*—I will go with my husband.

*Earl of Berkeley.*—Hussey, you shall go with me, I say.

*Lady Henrietta.*—I will go with my husband.

*Earl of Berkeley.*—My Lord, I desire I may have my daughter again.

*Lord Chief Justice.*—My Lord, we do not hinder you, you may take her.

*Lady Henrietta.*—I will go with my husband.

*Earl of Berkeley.*—Then all that are my friends seize her I charge you.

*Lord Chief Justice.*—Nay, let us have no breaking of the peace in the court.

Then the court broke up, and passing through the hall there was a great scuffle about the lady, and swords drawn on both sides, but my Lord Chief Justice coming by, ordered the tipstaff that attended him (who had formerly a warrant to search for her and take her into custody) to take charge of her, and carry her over to the King's Bench; and Mr. Turner asking if he should be committed too, the Chief Justice told him, he might go with her if he would, which he did, and as it is reported, they lay together that night in the Marshal's house, and she was released out of prison, by order of the court, the last day of the term" (*h*).

§ 63. The infant, however, must be capable of exercising a sound discretion upon the question, and this of course will depend upon its age and its degree of intelligence which varies in so remarkable a manner in different children. In a very

(*h*) On the question of protection afforded by the court to prevent a seizure either in court or *redeundo*, see *R.* v. *Mead*, 1 Burr. 542. *R.* v. *Brook*, 4 Burr. 1991. *Re Douglas*, 3 Q. B. 831.

recent case (*i*), where Mr. Justice Patteson refused an application for a writ of *habeas corpus*, made on behalf of an infant's mother, then in India, (the father being dead), in order to remove her son from the guardianship of persons who had for some time had the custody of him, the learned Judge said, "In deciding this question it seems to me it is altogether useless to question the child, as to with whom he might wish to be. *It is difficult to say at what age a child is capable of exercising a sound discretion, and judging for itself in matters of this kind* (*j*); but it seems to me that it is but a mockery to ask a child of nine years of age, whether he would sooner remain with the person who has brought him up, or go with a stranger" (*k*).

§ 64. The view here taken by the learned Judge as to the inability of an infant of the age of nine years to exercise a proper discretion on such a question, is in accordance with what was laid down by the Court of King's Bench in

(*i*) *In re Preston*, 5 Dowl. & L. 247.

(*j*) Between the ages of seven and fourteen years an infant is deemed *primâ facie* to be *doli incapax*; but this presumption may be rebutted by strong proof of a mischievous discretion, for then the maxim applies that *malitia supplet ætatem*. 1 Hale, P. C. 25. 27. It is mentioned in a note to Hale's P. C. 1. 25, that at Abingdon Assizes, Feb. 23rd, 1629, an infant between eight and nine years was convicted of arson and hanged.

(*k*) And see per Tindal, C. J., in *Re Ann Lloyd*, 3 Man. & Gr. 548.

the reign of George I., in a case where a female child nine years old was brought up by *habeas corpus* in the custody of its nurse (*l*). And it was moved that she might be discharged if she was under any restraint, which was agreed to, but it appeared she was not. The father's will was then produced, whereby he had devised the custody of her to her uncle, and an application was made that she might be delivered up to him as her guardian. The court at first doubted whether they should go any farther than to see that the child was under no illegal restraint; but afterwards declared that *this being the case of a young child who had no judgment of her own*, they ought to deliver her to her guardian, who took possession of her in court.

It will be observed, however, that here the proposition as to the incapacity of an infant of nine years of age to judge for itself is asserted more absolutely than in *Re Preston*, for there Mr. Justice Patteson seems to have laid stress upon the fact that a child of such tender years would, without doubt, if asked the question, prefer the society to which it was accustomed to that of a stranger, and that, therefore, it would be idle to propose it; but the court, in *R.* v. *Johnson*, said, without any reference to the predilections of habit, that a child of that age had no judgment of its own.

But although similar reasons are assigned for

(*l*) *R.* v. *Johnson*, 1 Stra. 579. S. C. 2 Ld. Raym. 1333.

these two decisions the results were different; for in the former case, the infant was allowed to *remain* in the custody of the persons who had previously taken charge of it; in the latter, the infant was *removed* from the custody of its nurse to that of its guardian.

§ 65. It is right, however, to notice that in a later case (*m*), which came before Lord Hardwicke, C. J., and the rest of the Court of King's Bench, it was said by Lee, J., that Lord Raymond, who had been a party to the judgment of the court in *R.* v. *Johnson*, repented of what was done in that case. But Lord Mansfield, at a subsequent period, declared his opinion, and that of the court, that the decision in *R.* v. *Johnson* was correct. He observed (*n*), "It is said in the next case (*R.* v. *Smith*) that Lord Raymond repented of what was done in this (*R.* v. *Johnson*). His Lordship was latterly a very scrupulous man. But we are clear his first judgment was the right one." In *R.* v. *Smith* (*m*), a boy between thirteen and fourteen years old, who was living with his aunt, was brought up by *habeas corpus at the suit of his father.* The reporter says, "And now upon debate that case

(*m*) *R.* v. *Smith*, Stra. 982.

(*n*) *R.* v. *Delaval*, 1 W. Bl. 412. 3 Burr. 1434, S. C. It is necessary to compare carefully these two reports, as they do not quite correspond.

(*R* v. *Johnson*) was overruled." The court decided that upon the writ of *habeas corpus* they could only deliver the child out of the custody of the aunt, and inform him he was at liberty to go where he pleased, and they said, that was all that was done in *Lady Catharine Annesley's case;* that the right of guardianship could not be determined by them in this summary way, and the father was not without other remedy; he might have trespass *quare filium et hæredem suum rapuit*, or other actions that would properly bring the right of guardianship in question.

§ 66. It will be observed, that it is incorrect to say, that by this judgment the case of *R.* v. *Johnson* was overruled, for there the decision which delivered the child over to her guardian, proceeded expressly upon the ground that she was so young (her age being nine years), that she had no judgment of her own; whereas, in *R.* v. *Smith*, the boy was within six weeks of fourteen, and, consequently, capable of exercising a discretion, which the court respected, and gave effect to. And Lord Mansfield, in the same judgment in which he upheld the ruling in *R.* v. *Johnson*, reviewed the three cases of *R.* v. *Clarkson* (*o*), *R.* v. *Johnson*, and *R.* v. *Smith*, and said, "We have considered those cases very fully. We think what was done in all of them was very

(*o*) Stra. 444. *Supra*, p. 98.

right; but we don't agree with what was said in the books about them." With regard to *R.* v. *Smith*, his Lordship said, "That case was determined right (barring the dictums that were used in it) for the court was certainly right in refusing to deliver the infant to the father, of whose design in applying for the custody of his child they had a bad opinion." And he added, "The true rule is, that the court are to judge of the circumstances of the particular case, and to give their directions accordingly" (*p*).

Very recently an illegitimate child, seven years old, about whose custody there was a dispute in the Bail Court, was called up to the Bench by Mr. Justice Wightman, and after having been privately questioned by him and found to be very intelligent, she was allowed to choose the person, although neither her father nor mother, with whom she was to reside. It was, however, agreed, that the mother should have access to her at all reasonable times (*q*).

(*p*) 3 Burr. 1437. In the report in 1 W. Bl. 413, the rule is given thus, "Upon the whole, the true rule to be collected from all these cases is, that if the circumstances require a change of the custody, it must be delivered in court. If they do not require it, the privilege *redeundo* is of course." It must be admitted that the statement in Burrow is the most clear and intelligible of the two.

(*q*) *In re White*, Jan. 25, 1848, not reported.

# CHAPTER VII.

## LAW OF CUSTODY IN CASES OF GUARDIANSHIP.

§ 67. As the object of this work is not to treat of the rights which belong to, nor of the duties which devolve upon those who are appointed guardians of infants in any other respect than as bearing upon the question of custody of the person, resort must be had by those who wish to make themselves fully acquainted with the law of guardianship to other treatises, which have entered at large upon the subject (*a*).

Nor is it necessary here to discuss the different *kinds* of guardianship, whether in Chivalry, in Socage, by Custom, by Nature, or for Nurture (*b*), respecting which much of the old law has either become obsolete, or has seldom any practical application at the present day. The last two kinds here mentioned may, in one sense, be said to embrace generally the question of parental

(*a*) See, especially, the first part of Macpherson's Law relating to Infants, where the whole question is discussed with much learning and accuracy. See also Chambers on the Jurisdiction of the Court of Chancery over Infants.

(*b*) See the very learned notes of Hargrave, Co. Litt. 88, *b*.

rights; but they have a technical meaning different from this. Guardianship by Nature properly applies only to the case of the custody of the heir apparent, who is entitled to lands by descent and this is quite distinct from the natural guardianship of all his children, to which a father is entitled during their minority (*c*).

Guardianship for or by Nurture only occurs where the infant is without any other guardian, and none can have it except the father or mother. It extends no further than the custody and government of the infant's person, and determines at the age of fourteen in the case both of males and females (*d*).

§ 68. Where the father is dead, and no other guardian has been legally appointed, the mother is guardian for nurture of each of her children, until they attain that age. If a guardian for nurture delivers over the infant to another for instruction, he may afterwards retake him into his own custody, although it has been said, that if he grants the infant (*i. e.* the custody) to another, that binds himself, so that he cannot claim the custody as against the grantee (*e*).

The father is, no doubt, while he lives, the natural guardian of his children during their

(*c*) See Macpherson on Infants, Part 1, 64.

(*d*) Bro. *Garde*, 70. *Ratcliff's case*, 3 Rep. 37, n. (13); Co. Litt. 88, *b*.

(*e*) Com. Dig. Guardian (D).

minority (*f*), nor can another be appointed guardian during his life, "although, in certain cases, a person may be nominated *to act as* guardian" (*g*). On the death of the father, without any appointment by him of a testamentary guardian, the mother has been declared to be guardian of the minor children by nature (*h*). She has, in such a case, a right to the custody of the person and care of the education of her children; it is a natural right, "and this in all countries," said Lord Hardwicke, "where the laws do not break in" (*i*).

§ 69. But the right of the mother is absolutely defeated, where the father, under the powers given to him by stat. 12 Car. 2, c. 24, appoints by deed or will another person to be the guardian of his children. For by section 8 of that statute it is enacted, "that where any person hath or shall or have any child or childen under the age of one and twenty years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or that time in *ventre sa*

(*f*) *Stileman* v. *Ashdown*, 2 Atk. 480. Lord Hardwicke there says "sons," but see per Lord Eldon, in *De Manneville* v. *De Manneville*, 10 Ves. 62.

(*g*) Per Lord Eldon, *Ex parte Mountfort*, 15 Ves. 447.

(*h*) *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 116. *Infra*, § 71.

(*i*) *Villareal* v. *Mellish*, 2 Swanst. 536.

*mère*, or whether such father be within the age of one and twenty years, or of full age, by deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one and twenty years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants; and that such disposition of the custody of such child or children, made since the 24th of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise; and that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward, or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children."

§ 70. Under this act the father alone has the

power of appointing a guardian; and where the will under which he nominated a party to that office was not duly executed, the Court of Exchequer on one occasion (sitting as a Court of Equity) so far respected his wishes as to appoint that party the guardian without any reference to the Master (*k*). The mother, however, has no such power, and an appointment by her is void (*l*). Neither can the guardian delegate the trust to another; it is a matter of personal confidence, and, therefore, not assignable, and will not pass to his executors or administrators (*m*). "Such testamentary guardian takes place of all other guardians, and his interest is for the good and honour of the family; as the father was the head of the family, so the statute puts him *in loco patris*" (*n*). He, therefore, has the power of determining at what school or university the minor shall be educated; and where an infant went to Oxford contrary to the orders of his guardian, who preferred Cambridge, a messenger was sent by the court to take him to the latter place. The young man, however, got back to Oxford, upon which, as the report quaintly ex-

(*k*) *Hall* v. *Storer*, 1 Y. & Coll. 556. See also in the case of an illegitimate child, *supra*, p. 85.

(*l*) *Bedell* v. *Constable*, Vaughan, 180. *Ex parte Edwards*, 3 Atk. 519.

(*m*) Ib. 179. *Lady Teynham's case*, 4 Bro. Parl. Ca. 302. *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 121.

(*n*) Ib. 124. See also per Littledale, J., in *R.* v. *Isley*, 5 Ad. & Ell. 448.

presses it, "there went another (messenger) *tam* to carry him to Cambridge *quam* to keep him there" (*o*).

§ 71. Where several guardians are appointed by the father under the powers given by stat. 12 Car. 2, c. 24, s. 8, even although there are no words of survivorship in the instrument of appointment, yet the office belongs to the survivor. Upon this question the case of Mr. Justice Eyre against the Countess of Shaftesbury (*p*) presents some interesting features. The Earl of Shaftesbury devised by will the guardianship of the person and estate of his infant son to Mr. Justice Eyre and two other persons (both of whom were dead before the commencement of the suit), without adding the words, "*and to the survivor of them.*" When the young earl was twelve years of age, the plaintiff, perceiving that his mother had not provided a proper tutor for him, petitioned the Lord Chancellor (Lord Macclesfield), that the person of the infant might be delivered over to him as sole surviving guardian. In opposition to the claim it was, amongst other objections, argued, that in this case the guardianship did not survive, for want of express words in the will to that effect. The Lord Chancellor, however, said, that where three guardians are

(*o*) *Tremaine's case*, Stra. 168, and see *Hall* v. *Hall*, 3 Atk. 721.
(*p*) 2 P. Wms. 104; and see *Wright* v. *Naylor*, 5 Madd. 77.

appointed by will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and that it would be mischievous and of very ill effect, if, where there are several guardians appointed by will, and some refuse to act, the rest should not be able to do anything; and yet this must be the consequence, if a guardianship devised to several should be taken to be one joint naked authority. He added, that the father has, by the statute, 12 Car. 2, c. 24, a right to dispose of the guardianship of his child until twenty-one, and having done so here, it would be binding, unless some misbehaviour were shown in the guardian, in which case, it being a matter of trust, the Court of Chancery had a superintendency over it. He, therefore, made an order that the infant should be delivered into the hands of the guardian, "who desired the young earl might dine with him. But the Lord Chancellor said, that was in confidence that the Judge should return him to his mother, the countess, at night, for that, as yet, the court could not make any order touching the custody of the earl's person" (*q*).

Afterwards, when the Great Seal was taken from Lord Macclesfield on the occasion of his

(*q*) Lord Macclesfield added, "But I must differ from Mr. Justice Eyre, as to sending the infant to a public school, *which may be thought likely to instil into him notions of slavery.*"

disgrace, the same plaintiff, then Lord Chief Baron Eyre, exhibited a petition to the Lords Commissioners, in which he stated, that the infant earl, then just fourteen years of age, had been married, without the consent or privity of the Lord Chief Baron, his surviving guardian, and was detained from him. He prayed, therefore, that the custody or tuition of the infant might be granted to him.

The earl also presented a petition, praying that he might be at liberty himself to choose his own guardian.

The court made an order that the person of the infant should be restored by the countess, his mother, to the Lord Chief Baron; and they said, that although the declaration made by the late Lord Chancellor, that the right of guardianship did belong to the petitioner as surviving guardian, and the order made thereupon, were ever so erroneous, yet that the same was a good order until reversed, and, consequently, it was a contempt to break it.

§ 72. With reference to the claims of the mother in such a case, it may be laid down that the right of a testamentary guardian is paramount as against her, and she has no right to interfere with his discretion in respect of the custody and education of the minor children. It had been argued in the above case on behalf of the

countess, that there was no instance on record where a complaint had been made in court against an infant's mother, for taking away her own child. But it was answered by the Lords Commissioners, that the guardians of the infant Duke of Hamilton petitioned against the Duchess of Hamilton for taking away the infant duke out of their custody, and their complaint was received; upon which the court would have proceeded against the mother, but the guardians could not make out their right of guardianship, by reason of some defect in the instrument under which they claimed. And as in the principal case the Lords Commissioners held, that the Countess Dowager of Shaftesbury had been guilty of a contempt in contriving and effecting the marriage of the infant son without the consent of the guardian, and without applying to the court, they ordered that a sequestration should issue against her.

On a late occasion (*r*), the law with regard to the conflicting claims of a testamentary guardian and a mother, was explicitly laid down by Lord Chancellor Cottenham, who said, "It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians, and if under the peculiar circumstances, I think it

(*r*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 683.

proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians."

§ 73. In the case of female infants this testamentary guardianship determines on their marriage, but continues in the case of males until the age of twenty-one notwithstanding that event (*s*).

§ 74. Over all guardians, whether testamentary or appointed by the Court of Chancery, that court will exercise efficient control, and interpose its authority whenever there is reasonable ground for apprehension that the interests of infants are likely to suffer injury, or a particular place or course of education is deemed proper for them. Lord Chancellor Macclesfield on one occasion (*t*), "with some warmth" said, that the guardians were but trustees, and that the court would and had interposed even in the case of a father;

(*s*) *Mendes* v. *Mendes*, 1 Ves. 91; and see *Roach* v. *Garvan*, Ib. 160. *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 109.

(*t*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 704, 705; and see *Roach* v. *Garvan*, 1 Ves. 160. *Storke* v. *Storke*, 3 P. Wms. 51. *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 683. Lord Nottingham, however, in *Foster* v. *Denny*, 2 Bro. Ch. Ca. 237, with reference to a testamentary guardian said, that he could not *remove* a guardian by act of Parliament. See also *Ingham* v. *Bickerdike*, 6 Madd. 275. *Dillon* v. *Lady Mount Cashel*, 4 Bro. Par. Ca. 306.

that preventing justice was to be preferred to punishing justice; and that he ought rather to prevent the mischief and misbehaviour of guardians, than to punish it when done. That if any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infants being like to suffer by the conduct of the guardians, or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the court would interpose, and order the contrary; and that this was grounded upon the general power and jurisdiction which it had over all trusts, and a guardianship was most plainly a trust.

§ 75. This controlling power of the court over testamentary guardians was exercised in the following case (*u*):—H. G. by will made H. C. and T., guardians of his infant daughter, desiring them to take care of her and her estate during her minority. C. educated the daughter under him while he lived; but after his death, she was placed at a boarding school by the surviving guardians; when H. took her from the school (she being then of the age of nine years and three months) and married her to his own son F. H., who had no estate, and was apprentice to a peruke maker. A motion was made in the

(*u*) *Goodall* v. *Harris*, 2 P. Wms. 561.

Court of Chancery on the subject, and the parties were ordered to attend, when Lord Chancellor King said, "The infant girl never having been under the care of the court, nor committed by the court to the custody of the defendant H., I do not think this an immediate contempt of the court; but then it is a very ill thing in the guardian to marry this child to his own son, and punishable by an information; and I will have this guardian bound over with sureties to be taken by the Master, to appear and answer to an information to be exhibited by the Attorney General against him.

As to the child, let her be delivered over by this knavish guardian to the other guardian T., but he being at present in the country, the child shall be placed with the plaintiff's clerk in court, to be by him delivered to T., who (it is to be presumed) will act, as he has not yet renounced the guardianship; and let it be done this afternoon, otherwise H., the guardian, to stand committed."

Where a testamentary guardian declines to act, a guardian may be appointed on petition (*v*); but a testamentary guardian cannot be *removed* for misconduct without bill (*w*).

(*v*) *O'Keefe* v. *Casey*, 1 Scho. & Lef. 106. See *In re Johnstons*, 2 Jon. & Lat. 222.

(*w*) *O'Keefe* v. *Casey*, 1 Scho. & Lef. 106. *In re McCullochs*, 1 Dru. 276. As to what is a sufficient appointment of a testa-

§ 76. A case of some importance bearing upon the subject of the rights of a joint testamentary guardian was recently decided (*x*). An action of trespass was brought by the mother of two infants against the servants of a party, who was with her a joint testamentary guardian of them, for taking them out of her custody; and the declaration stated, that the defendants assaulted one F. S. G. and one J. G., then being the sons and servants of the plaintiff, and forcibly took them away from her, *per quod servitia amisit.* The defendants pleaded that the said F. S. G. and J. G. (the infants in question) were the lawful issue of the plaintiff and one J. M. G., and that the latter by a codicil to his will, directed that W. G. should be a guardian of the said F. S. G. and J. G., "with a certain person therein in that behalf named." The plea then after alleging the death of J. M. G. and the acceptance of the trust by W. G. whereby he became lawful guardian with the said other person of the children, stated, that the children were under the age of eight years and above the age of four, and were in the custody of the plaintiff as such servants, as in the declaration mentioned, and that she had them in her custody without the license

mentary guardian, see *Ex parte Earl of Ilchester*, 7 Ves. 348. *Miller* v. *Harris*, 14 Sim. 540.

(*x*) *Gilbert* v. *Schwenck*, 14 M. & W. 488. See also *Campbell* v. *Mackay*, 2 Myl. & Cr. 37.

or consent and against the will of the said W. G., who was desirous of having the care and custody of them. The plea then justified the act complained of, as done by them as servants of the said W. G., and by his command, that he might have the care and custody of the children. To this there was a replication, that the said W. G. was appointed joint guardian with the plaintiff, she being the said "other person" named in the codicil. The defendant specially demurred to this replication, but the chief point insisted upon in argument was, that no action would lie by the testamentary guardian against the defendants for taking out of her custody a child, in whom the party by whose authority they acted, had, as co-guardian with her, a joint interest. On the other side it was contended, that the plea was bad in substance, for it admitted that the children were the servants of the plaintiff; and if so, the testamentary guardian could not take infants out of the custody of their *master* or *mistress*, and so destroy the contract of service. In delivering the judgment of the court, Parke, B. said, "The solution of this question depends upon the nature of the power which, at the time of the alleged trespass, vested in W. G., by virtue of his appointment of joint guardian.

Guardians appointed by will, according to the statute of 12 Car. 2, c. 24, have no more power than guardians in socage, and are but trustees.

This doctrine is recognised in *The Duke of Beaufort* v. *Berty* (*y*), and *Frederick* v. *Frederick* (*z*). But one of two joint trustees cannot act in the trust in defiance of the will of the other; each has an equal power. It seems to follow, that as the children were in the custody of the plaintiff, and in a service which, upon these pleadings, must be taken to have been in its nature lawful, the defendants, as the servants of W. G., were not justified in removing them against the plaintiff's will.

It is unnecessary to discuss the effect of the plaintiffs being, in the absence of any appointment of testamentary guardian, the natural guardian of the infants."

§ 77. Where testamentary guardians are appointed, the court will, notwithstanding, take into account the wishes of the deceased father as to the place and mode of education of his children. Lord Cottenham said, " that the law will pay the highest respect to the expression of his wishes" on this point (*a*). But at the same time care will be taken not to disregard the rights of the testamentary guardian, even while carrying into effect the wishes of the testator, and in adjusting this matter nice and delicate questions may fre-

(*y*) 1 P. Wms. 703. (*z*) Ib. 721.

(*a*) *Campbell* v. *Mackay*, 2 Myl. & Cr. 34; see also *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 683, 684.

quently arise. Thus a father appointed two persons guardians of his infant children, and "recommended" that if his wife should die before his son should attain the age of twenty-one, or before his daughters should attain that age or marry, the guardians should place such of them as should then be minors under the care of his cousin M. P., to be assisted by their aunt S. B. (*b*). After the death of the mother, a suit was instituted by the maternal grandfather in the names of the infants for the purpose of making them wards of court; and a petition was presented by him, and an order made by the Vice Chancellor of England, referring it to the Master to settle a scheme for their education and management. This scheme provided that they should forthwith be placed under the care and be maintained and educated under the direction of M. P. assisted by S. B.

To this the surviving testamentary guardian objected, partly on account of the distance of the proposed place of residence from his own home, and partly because the two ladies were dissenters from the church of England. The Lord Chancellor (Lord Cottenham), however, said, that although he was clearly of opinion that they had no claim whatever to the character of testamentary guardians, yet it was certain that the testator had expressed a wish with respect to

(*b*) *Knott* v. *Cottee*, 2 Phill. 192.

them, which the court, no less than the testamentary guardian was bound to attend to. But, he asked, "is the testamentary guardian to have no supervision as to the mode in which the money allowed for the maintenance and education of the children is to be expended? I cannot think that that is consistent with the testator's intention." The Lord Chancellor then said, "What occurs to me on this point is this; I see no objection to leaving the immediate custody of the children to Miss P., who, being with the children, may be better able to judge what they actually want; but that there should be no change of residence and no change of governess without communication with the testamentary guardian. I think it will be better not to give him the control, but to give him information, in order that he may, if he thinks there is a case for it, come to the court for direction; and also that half-yearly accounts should be rendered to him, as to the mode in which the allowance has been expended for the benefit of the children; for I think that is a right which he has as testamentary guardian. This, I think, will give him as much control and superintendence as the testator intended he should have, while it will give effect to the expressed wish of the testator as to the persons to whom the immediate care of the children should be intrusted" (*c*).

(*c*) See *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 684.

§ 78. In the *case of the Earl of Ilchester*, Lord Eldon laid down some wise rules to be observed by the guardian, in respecting the wishes of the mother in the execution of his important and responsible office. He said (*d*), "In this case I need not add, that though the effect of the appointment of a guardian is to commit the custody of the guardianship, this court looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest it is important to observe, that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings towards the parent; the best and most important duty imposed upon the guardian by the deceased parent."

§ 79. The next subject to consider is the case of guardians appointed by the Court of Chancery.

We have already noticed the rule laid down by Lord Eldon, that to enable that court to interfere in the care of infants, they must have property, not from any want of jurisdiction on the part of the court, but from the want of means to exercise its jurisdiction with effect (*e*). This,

(*d*) 7 Ves. 381.

(*e*) *Supra*, p. 16. See also the observations of Vice Chancellor Knight Bruce, in *Re Fynn*, 12 Jur. 720.

however, must not be understood as meant to apply to cases where the court is merely called upon in the exercise of its common law right to issue a writ of *habeas corpus*, to relieve against an improper custody; but only where something further is required, such as provision to be made with respect to the education and maintenance of the infant. Otherwise there would be no force in the reason assigned by Lord Eldon for the limitation which he draws, for the absence of property in the infant cannot constitute "a want of means to exercise the jurisdiction" of the court, where all that is required is removal from illegal or improper restraint of the person. And it should have been in a previous part of the work mentioned, that the same distinction seems to be observed in favour of infants, where the application is simply by petition that they may be delivered up to the proper custody. In a recent case of the latter kind (*f*), where it was contended that the Court of Chancery had no jurisdiction over infants, distinct from that at common law upon *habeas corpus*, unless there was some property to be administered for the infants' benefit, Lord Chancellor Cottenham said, "I have no doubt about the jurisdiction. The cases in which the court interferes on behalf of infants, are not confined to those in which there is property. Courts of law interfere by *habeas*

(*f*) *In re Spence*, 2 Phillips, 247.

for the protection of the person of *any* body who is suggested to be improperly detained (*g*). This court interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the crown as *parens patriæ*, and the exercise of which is delegated to the Great Seal." By attention to the distinction which has been above pointed out, we may without difficulty reconcile the dicta of Lord Eldon and Lord Cottenham which at first sight seem to conflict.

The petition in this case was from the father of three minor children, and it prayed that they might be delivered up to him by the trustees of his marriage settlement, and that, if necessary, a writ of *habeas corpus* might issue for that purpose. The infants had been taken away by their mother who was living with them out of the jurisdiction of the court, and she had been accompanied by her brother, who was one of the trustees, during part of her journey; and it was alleged, that he and his co-trustee were acquainted with the place of her concealment. On the other side it was alleged, that the father wished to have possession of the children, in order that he might bring them up in the doctrines of the Roman Catholic church, although the mother was a Protestant; and that ever since their marriage she had received from him harsh and unfeeling treatment.

(*g*) See *supra*, p. 54.

Upon this Lord Cottenham observed, that it does not follow, that because a husband's conduct is such as to make his wife unhappy, he is therefore to be deprived of the custody of his children. To justify such an interference with the father's rights, his misconduct must appear to be of such a nature as to be likely to contaminate and corrupt the morals of his children, as in the *Wellesley case* (*h*). His Lordship, however, refused to grant the prayer of the petition, on the ground that the infants were not in the custody of the trustees; and as to the alleged knowledge of the brother, he said, "as to compelling him to disclose the place of their concealment, he is a mere witness to that. I could exercise the jurisdiction of the court over him if he had the children in his custody; but I cannot put it in force against parties to compel them to disclose facts of which they are mere witnesses."

§ 80. But, regard being had to the nature of the cases, where, in order that the court may interfere with effect, it has been held to be necessary that the infant should be entitled to some property, the expedient has been sometimes resorted to of settling a small sum of money upon him, and then filing a bill for the due administration of the property (*i*). For when the court

(*h*) 2 Russ. 1. *Supra*, p. 23.

(*i*) It seems that 100*l*. would be sufficient for this purpose. See Macpherson on Infants, Part 1, p. 103, 104.

has once got hold of the case, it will take care that the interests of the minor are attended to as regards its custody and education, as well as the management of its estate. And where there is no suit, but merely a petition for that purpose, the Court of Chancery will, in such a case, appoint a guardian both for the person and for the estate, although if there is a suit pending it will appoint a guardian for the *person only* (*k*). Unlike the case of joint testamentary guardianship, where the office, as has been previously mentioned, survives, if several guardians are appointed by the Court of Chancery, the office determines on the death of any one of them, although the survivor or survivors will be re-appointed without a reference to the Master (*l*).

§ 81. Where a testator had left to infants who were his natural daughters considerable fortunes, and the Master had appointed a guardian for them with an allowance for their maintenance, the mother who was desirous that they should live with her, presented a petition objecting to the Master's report and praying that it might be reviewed. The Lord Chancellor, however, confirmed the appointment of the guardian, but directed the Master to consider what intercourse

(*k*) Seton's Decrees, 277, 278. *Ex parte Becher*, 1 Bro. C. C. 555.

(*l*) *Bradshaw* v. *Bradshaw*, 1 Russ. 528. *Hall* v. *Jones*, 2 Sim. 41.

between the infants and the mother could be reasonably provided for in the plan of their maintenance and education under the guardian (*m*). And in the case of an infant of the age of fifteen years, whose father was dead, and with respect to whose custody differences existed between the paternal and maternal relations, the Vice Chancellor of England said, that as the parties could not agree amongst themselves, he considered it to be a matter of course to direct a reference to the Master to approve of a guardian (*n*).

§ 82. Whatever difficulties may have formerly occurred in questions of guardianship on account of the penal or disabling laws then in force against Roman Catholics, they can hardly be said to exist at the present day (*o*). Even in the time of Lord Eldon, he admitted that with reference to the distinction between Protestants and Catholics, the court used to interfere in the education of children in many instances in which it would not interfere now (*p*). And the following im-

(*m*) *Courtois* v. *Vincent*, Reg. Lib. (A), 1820, fol. 303; Jac. 268.

(*n*) *Coham* v. *Coham*, 13 Sim. 639.

(*o*) On this subject, see the case of *Lady Teynham*, 4 Bro. Par. Ca. 302. *Hill* v. *Filkin*, 2 P. Wms. 5. *Blake* v. *Leigh*, Amb. 306. *In re Bishop*, Reg. Lib. 1774, (A), p. 185; Macpherson on Infants, Chap. 12.

(*p*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 22. See also as regards dissenters, *per* Lord Cottenham, L. C., in *Knott* v. *Cottee*, 2 Phill. 195.

portant case shows that the court will give the fullest effect to the intention of a Roman Catholic father that his children should be brought up in the tenets of that religion.

G. H. Talbot, who was a Roman Catholic, had married A. Berkeley, a Protestant, and they had issue two children, John and Augusta Talbot. No stipulation had been made in the marriage settlement or otherwise as to the faith in which the children should be educated; but by a separation deed afterwards executed between Mr. and Mrs. Talbot, it was stipulated that the daughter Augusta should, until she attained her tenth year, remain under the sole care and management of her mother, and that the son John should remain with his father, but that the mother should have the liberty of seeing him at all reasonable times. The father died in 1839, having by will appointed the Rev. T. Doyle, a Roman Catholic clergyman, the sole and entire guardian of his children, who were both minors, and his sole executor; and he bequeathed to him the whole of his personal property (*q*).

The infants were entitled under the will of Charles Earl of Shrewsbury each to a large sum of money, contingently upon their attaining the age of twenty-one years, or in the case of the daughter being married, with a right to allowance during their minorities; and in default of

(*q*) *Talbot* v. *Earl of Shrewsbury*, 4 Myl. & Cr. 673.

their attaining a vested interest in those sums, John Earl of Shrewsbury, the residuary legatee of Charles Earl of Shrewsbury, would be entitled to the money.

Two suits were instituted for the purpose of having the trusts of the will of Charles Earl of Shrewsbury performed under the decree of the court.

In 1839, after the father's death, a petition was presented in one of the suits to the Lord Chancellor (Lord Cottenham) in the name of the infants, praying that John Earl of Shrewsbury and Doyle might be restrained from taking them or either of them out of the jurisdiction, and that the infants might be permitted to reside with their mother at such reasonable and proper times as to the court should seem meet; and more particularly that the infant John might be permitted to visit and reside with his mother. The petition also prayed that it might be referred to the Master to settle a scheme for the future education of the infants (the son being then nine and the daughter eight years old), regard being had to the just claims of the infants to visit their mother, and reside with her at all convenient times.

At the same time another petition was presented in the other suit by Doyle in the name of the infants, praying, amongst other things, that the infant, John Talbot, might be allowed to

reside with the Earl of Shrewsbury and be educated under his inspection but under the direction of Doyle, and also travel abroad with the Earl of Shrewsbury, accompanied by his tutor.

About this time the mother married the Hon. C. F. Berkeley, and various other proceedings took place, until the matter came finally before the court upon a petition presented by Doyle praying that Mr. and Mrs. Berkeley might be ordered to deliver up the person of the infant Augusta Talbot to him as her sole testamentary guardian; and also upon another petition presented by Mrs. Berkeley praying, amongst other things, that her son, John, might have unrestrained intercourse with her and be allowed to visit her at her own residence, and reside with her at convenient and proper times. This petition also alleged, that the Earl of Shrewsbury and Doyle, under whose exclusive power and control the minor son was then placed, were bound by the obligations of conscience as Roman Catholics, and were fully determined, to educate him in the religious tenets of the church of Rome.

We have previously noticed what was said by the court on this occasion with respect to the *rights* of the testamentary guardian as against the mother (*r*); but, under the particular circumstances of the case, it did not think the removal of the daughter Augusta then expedient.

(*r*) *Supra*, p. 115.

With regard to the latter petition, the Lord Chancellor said, that the court would not, without a case made, interfere with the manner in which the testamentary guardian exercised his authority. *Primâ facie*, he had a right to the possession of both children. He had a right to exercise his discretion. He had exercised his discretion for the present, and thought it more for the benefit of the child that he should be removed from school, and placed in the house of his uncle. Then the question was, whether that peculiar circumstance which had been the subject of so much discussion was to regulate the mode of the boy's religious education. It was said there were circumstances of pecuniary benefit and property which ought to induce the court to educate him in a manner which, if it were the duty of the court to interfere, it would find it very difficult to prescribe. In the first place, this child was born of a Roman Catholic father, who, though he married a Protestant lady, did not, on that marriage, enter into any stipulation as to the faith in which his children should be brought up. The father, who had the power of regulating the method of bringing up his children, and of extending that power after his death, appointed, as testamentary guardian, a clergyman of the Roman Catholic church, and the court thought it impossible that the father could

more distinctly indicate his wishes as to the faith in which his child should be brought up. Although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith. When, therefore, a Roman Catholic father appoints a Roman Catholic guardian, there can be no doubt as to the father's intention; and if the court were to interfere with the exercise of the guardian's discretion as to the faith in which the child should be educated, it would be doing an act of very great injustice. Nothing can be more dear to a father than regulating the religious education of his child; and if the court were to interfere in the manner desired, it would adopt a course to induce those dissenting from the Established Church to suppose that the court would interfere to control the education of their children. The Lord Chancellor then alluded to the observations of Lord Eldon, in the case of *Wellesley* v. *Duke of Beaufort* (*s*), upon which he remarked: he says, "that the law is now changed, and that it is now lawful to educate a child in the Roman Catholic faith; and when he speaks

(*s*) 2 Russ. 21. *Supra*, p. 129. See also *In re North*, 11 Jur. 7, and *supra*, p. 36. 52.

of former times he speaks of times when the vain attempt was made to influence the religion of families by penal statutes."

The petition was therefore dismissed.

§ 83. It is in order that the court may be able to exercise its superintending care over infants with effect, that it has always shown great jealousy in allowing infants over whom it has control to be taken out of its jurisdiction by going abroad.

We have seen that even a father, who was an alien, has, under particular circumstances, been restrained from removing his minor child to a foreign country (*t*); and where permission has been given to him to carry his children, who were wards of court, abroad with him, a special undertaking has been required that he would bring them back with him on his return, and in the meantime inform the court, by proper vouchers half-yearly, of the plan of education pursued with regard to each of the children, and specify where and with whom they resided (*u*). In *Campbell* v. *Mackay* (*v*), Lord Cottenham, with reference to this question, said, "Independently of this well established rule of the court, and the principle

(*t*) *De Manneville* v. *De Manneville*, 10 Ves. 52. *Supra*, p. 20. 22.

(*u*) *Anon.* Jac. 264, n. (*a*). *Supra*, p. 50, 51. See also *Stephens* v. *James*, 1 M. & Keen, 627. *Lethem* v. *Hall*, 7 Sim. 141.

(*v*) 2 Myl. & Cr. 31.

upon which it proceeds, I am convinced that scarcely anything can be more injurious to the future prospects of English children and particularly of English boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from the courses of education which their contemporaries are pursuing, and accutomed to habits and manners which are not those of their own country, they must be becoming from day to day, less and less adapted to the position which it is to be wished they should hereafter occupy in their native land."

# CHAPTER VIII.

## CUSTODY OF INFANTS' UNDER STAT. 2 & 3 VICT. CAP. 54.

§ 84. THE hardships, not to say cruelty, inflicted upon unoffending mothers by a state of the law which took such little account of their claims or feelings, in a matter in which they are so deeply interested as the custody of their own children, had for a long time attracted attention before a partial remedy was provided; and it was not without much difficulty, and after much opposition, that in 1839, the statute was passed which forms the subject of the present chapter, and which is generally known by the name of Mr. Justice Talfourd's Act.

When the bill was in the House of Lords, Lord Lyndhurst gave it his powerful support, and thus described the evils which it was intended in some degree to remedy (*a*). He said, that by the law of England, as it then stood, the father had an absolute right to the custody of his children, and to take them from the mother. However pure might be her conduct—however amiable—how-

(*a*) Hansard's Parl. Deb. vol. 49, p. 436 (3rd series).

ever correct in all the relations of life, the father might, if he thought proper, exclude her from all access to the children, and might do this from the most corrupt motives. He might be a man of the most profligate habits; for the purpose of extorting money, or in order to induce her to concede to his profligate conduct, he might exclude her from all access to their common children, and the course of the law would afford her no redress. That was the state of the law as it then existed. Need he say, that it was a cruel law—that it was unnatural—that it was tyrannous—that it was unjust?

On the other side it was argued, that the father was responsible for the rearing up of the child; but when unhappy differences separated the father and mother, to give the custody of the child to the father, and to allow access to it by the mother, was to injure the child; for it was natural to expect that the mother would not instil into the latter any respect for the husband whom she might hate or despise. Such a system would prevent a child from being properly brought up. The present Lord Chancellor rested his opposition to the bill, chiefly on the ground that it did not sufficiently attend to the conservation of the rights of the children, and he thought that objections existed to the machinery of the first two clauses which must render it impossible to adopt the bill.

§ 85. This statute enacts,—

I. That it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.

II. That on all complaints made under this act, it shall be lawful for the Lord Chancellor or the Master of the Rolls in England, and for the Lord Chancellor or the Master of the Rolls in Ireland, to receive affidavits sworn before any Master in ordinary or Master extraordinary of the Court of Chancery; and that any person who shall depose falsely and corruptly in any affidavits so sworn shall be deemed guilty of perjury, and incur the penalties thereof.

III. That all orders which shall be made by virtue of this act by the Lord Chancellor or the

Master of the Rolls in England, and by the Lord Chancellor or the Master of the Rolls in Ireland, shall be enforced by process of contempt of the High Court of Chancery in England and Ireland respectively.

IV. Provided always, That no order shall be made by virtue of this act whereby any mother against whom adultery shall be established, by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant or access to any infant, anything herein contained to the contrary notwithstanding.

§ 86. Although this act in terms mentions only the Lord Chancellor and the Master of the Rolls, yet under it, the Vice Chancellors have equally jurisdiction (*b*). Indeed, it has been said by authority, that when the bill was introduced into the House of Lords, it did contain the words "the Vice Chancellor;" but those words were struck out because, jurisdiction being expressly given to the Lord Chancellor, that jurisdiction could be exercised by the Vice Chancellor as a matter of course, and therefore it was deemed unnecessary to mention him (*c*).

§ 87. Soon after the passing of the act, a peti-

(*b*) *In re Taylor*, 10 Sim. 291.
(*c*) Ib. 292.

tion was presented to the Vice Chancellor (of England) by Mrs. Taylor (*d*), living apart from her husband, who had taken their five children, two of whom were more than seven years old, but the other three under that age, to reside with him in France; and she prayed that such of the children of the marriage as were under the age of seven years might be delivered to and remain with her until they attained that age; and that she might be at liberty to have access to such of the children as the court might not order her to have the custody of, under such regulations as to the court might deem right.

It appeared that Mrs. Taylor had quitted her husband's house on suspicion of his having committed adultery; but she afterwards admitted that she was mistaken, and that this charge against him was wholly without foundation. They, however, remained separate for a considerable period, and at last Mrs. Taylor instituted a suit for the restitution of conjugal rights. This suit was pending when the petition came on for hearing before the Vice Chancellor.

On the part of Mr. Taylor, it was contended that the act, 2 & 3 Vict. c. 54, left the legal right of the father exactly as it was previously; it established no new jurisdiction, but enlarged that which already existed, leaving the character

(*d*) *In re Taylor*, 11 Sim. 178.

of the enlarged jurisdiction as it found it, merely discretionary; and that it was never meant to apply to the case of children resident out of the jurisdiction, where such residence had commenced before proceedings under the act were taken; much less could it be applicable, when the subject-matter was situate in a foreign country, governed by independent laws, and not subject to the British Crown.

The Vice Chancellor (of England) in giving judgment said, that as the jurisdiction given by the act was to be exercised solely in the discretion of the court, it would be hardly right for the court to say that the lady was entitled to have access to her children, pending the question in the Ecclesiastical Court which she had thought proper to raise. He thought that the conduct of the husband had been *bonâ fide* throughout. He refused, therefore, to make any order on the petition, until he knew the result of the proceedings in the Ecclesiastical Court, and the petition was to stand over with liberty to apply.

§ 88. The question of jurisdiction under this statute came also recently under the consideration of Vice Chancellor Knight Bruce, in a case where a petition was presented by a Mrs. Tomlinson, praying that her infant son, not quite two years old, might be delivered into her custody, subject

to such regulations as the court might think fit to make. She had been married in 1845, and the child was born in March, 1847, but the husband and wife had lived separate since July, 1846, she charging him with acts of cruelty towards her. In November, 1848, the husband instituted a suit in the Consistory Court of Chester for the restitution of conjugal rights, and on the 5th of March, 1849, he sued out a writ of *habeas corpus*, returnable before Mr. Justice Patteson, to get possession of his child. The case was however adjourned by the learned Judge until the 27th of March, in consequence of the wife alleging that she was about to apply by petition to the Court of Chancery, and in the meantime bail was taken for the production of the infant.

It was objected before the Vice Chancellor, that the case was not within the stat. 2 & 3 Vict. c. 54, which applied only where the infant was "in the sole custody or control of the father thereof, or of any person by his authority." His Honor, however, said, that he thought that the court, upon the equity of the statute had jurisdiction. Judging from admitted facts, he was of opinion, that there was no reasonable probability that the mother would succeed in her resistance to the suit instituted by her husband, but as she wished to file further affidavits which, under the circumstances of the case, seemed to

be allowable, his Honor ordered the petition to stand over until further order to be made within a time specified; and directed that in the meantime, as the infant was a weakly child, and then under good care and in a state of comfort and security, it should remain where it was—the mother and the next friend undertaking to make proper provision for its maintenance and care.

Upon this, an application was made on the part of the father, for an order that he might have access to the infant in the meantime; but the Vice Chancellor said, "No; I have thought of that; but on the whole, I do not feel inclined to grant it" (*e*).

§ 89. The case of *Warde* v. *Warde* (*f*), has been previously cited, and the facts have been detailed, so far as they were necessary to show the kind of conduct on the part of a father against which the Court of Chancery will interfere for the protection of infants. The petition of Mrs. Warde was intituled both in the cause and in the matter of the Custody of Infants' Act, 2 & 3 Vict. c. 54,

(*e*) The petition was heard and the original order made, March 31st, 1849. The parties afterwards agreed to live together, and no further application was made to the court.

(*f*) *Supra*, p. 31—36. It is there stated that the case has not been reported, but this is a mistake. It will be found in 2 Phill. 786, although the judgment, as to the effect of the evidence, is not so fully there given as in the text, *ubi supra*.

and the Lord Chancellor having suggested that it should stand over, in the hope that some amicable arrangement might be come to by the parties, said, that the object of the act and of the promoters of it, and that which he thought appeared on the face of the act itself, was to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law stood before, however much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave to him of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. That was the object with which the act was introduced, and that was the construction he put upon it. It gave the court the power of interfering, and when the court saw that the maternal feelings were tortured for the purpose of obtaining anything like an unjust advantage over the mother, that was precisely the case in which it would be called upon and ought to interfere.

The result was that, as has been already men-

tioned, the Lord Chancellor made an order for the removal of all the children from the custody of the father, and their delivery to the mother, she and her brother undertaking to maintain them until further order. At the same time, as was the case in *Shelley* v. *Westbrooke* (*g*), the father was restrained from applying for a writ of *habeas corpus;* for otherwise, as the Lord Chancellor observed, the order might be reversed by a Judge at common law.

§ 90. It may be useful to mention that by stat. 3 & 4 Vict. c. 90, the following provisions have been enacted with respect to the care and custody of infants, who have been convicted of felony.

Sect. 1, provides, That in every case in which any person being under the age of twenty-one years shall hereafter be convicted of felony, it shall be lawful for her Majesty's High Court of Chancery, upon the application of any person or persons who may be willing to take charge of such infant, and to provide for his or her maintenance and education, if such court shall find that the same will be for the benefit of such infant, due regard being had to the age of the infant, and to the circumstances, habits, and character of the parents, testamentary or natural

(*g*) 1 Jac. 265. *Supra*, p. 36.

guardian, of such infant, to assign the care and custody of such infant, during his or her minority, or any part thereof, to such person or persons, upon such terms and conditions, and subject to such regulations respecting the maintenance, education, and care of such infant, as the said Court of Chancery shall think proper to prescribe and direct; and upon any order for that purpose being made, and so long as the same shall remain in force, the same shall be binding and obligatory upon the father, and upon every testamentary or natural guardian of such infant, and no person or persons shall be entitled to use or exercise any power or control over such infant which may be inconsistent with such order of the said Court of Chancery: Provided always, That the said court may at any time rescind such assignment, or from time to time rescind, alter, or vary any such terms or conditions, or such regulations, as to the said court may seem fit; and provided also, that the said High Court of Chancery shall and may award such costs as to it may seem fit, against any such person or persons who shall make such application as aforesaid, if such application shall not appear to the said court well founded, and such costs shall be payable to any parent, or other natural or testamentary guardian of any such child who shall oppose such application.

Sect. 2, enacts, That in every case it shall be a part of the terms and conditions upon which such care and custody shall be assigned, that the infant shall not, during the period of such care and custody, be sent beyond the seas or out of the jurisdiction of the said Court of Chancery.

# APPENDIX.

### ORDER IN COURT OF CHANCERY FOR HABEAS CORPUS FOR DELIVERY OF CHILDREN TO FATHER (*a*).

*The Order was made on Petition.*

His Lordship doth order that a writ of *habeas corpus* do issue, returnable immediately, directed to the said Emily Mary Marchioness of Salisbury, and Emily Anne Bennett Elizabeth Countess of Westmeath, to bring before his Lordship the bodies of Lord Delvin and Lady Rosa Nugent, at his Lordship's room, on Saturday morning the 19th instant, at eleven o'clock. In the matter of the children of the Earl of Westmeath, L. C., 16th June, 1819. Reg. Lib. (A), 1818, fol. 1359.

### ORDER ON HABEAS CORPUS FOR DELIVERY OF CHILDREN TO FATHER.

His Lordship doth order that the bodies of the said Lord Delvin and Lady Rosa Nugent, the children of the said Earl of Westmeath, be delivered to him. In the matter of the children of Earl of Westmeath, L. C., 23rd June, 1819. Reg. Lib. (A), 1818, fol. 1534. S. C. Jac. 251, note.

(*a*) See Seton's Decrees and Orders in Equity, p. 281.

### ORDER IN COURT OF CHANCERY FOR HABEAS CORPUS FOR BRINGING UP CHILDREN ON APPLICATION OF FATHER.

*The Order was made on Motion.*

His Lordship doth order that a writ of *habeas corpus* do issue, directing the said defendants George Blenkin and Mary his wife, to bring into this court the plaintiffs Mary Lyons, Frances Lyons, and Jane Beatson Lyons, the infant children of the said John Lyons, at the sitting of this court, at Westminster Hall, on the 10th of February next. *Lyons* v. *Blenkin*, L. C., 15th January, 1820. Reg. Lib. (B), 1819, fol. 208. S. C. Jac. 247. *Supra*, p. 37.

### WRIT OF HABEAS CORPUS IN THE ABOVE CASE (*b*).

George the Third, &c. To George Blenkin and Mary his wife greeting. We command you, that you do on Thursday, the 15th day of February next, bring before us in our Court of Chancery, at the sitting thereof at Westminster Hall, the bodies of Mary Lyons, Frances Lyons, and Jane Beatson Lyons, or by whatsoever name or addition they are known or called, who are detained in custody, to perform and abide such order as our said court shall make in their behalf. And hereof fail not, and bring this writ with you. Witness ourself, at Westminster, the 29th day of January, in the sixtieth year of our reign.

(*b*) The question of whether a writ in this form issues from the equity or common law side of the Court of Chancery, has very recently been fully discussed before the Judicial Committee of the Privy Council, in a case *In re Belson*, (Jan. 24th, 1850), in which judgment has not yet been given.

THE RETURN TO THE ABOVE WRIT.

THE within named George Blenkin and Mary his wife do hereby certify to the Right Honorable the Lord High Chancellor of Great Britain, that the within-named plaintiffs Mary Lyons, Frances Lyons, and Jane Beatson Lyons, are detained by and are under the protection of the said Mary Blenkin, in the parish of Sculcoates in the county of York, for the purpose of being educated and maintained by her as their guardian, under the will of their grandmother, Mary Beatson, deceased, and according to the trusts and directions for those purposes contained in the said will. Dated the 9th of February, 1820.

### ORDER FOR GUARDIAN AND MAINTENANCE ON PETITION.

It is ordered, that it be referred to Mr. S., one, &c., to approve of a proper person or persons to be appointed guardian or guardians of the person and estate of the petitioner during her minority. And it is ordered, that all proper parties have notice to attend the said Master thereon, and be at liberty to propose such guardian or guardians. And it is ordered, that the said Master do inquire and state the petitioner's age, and the nature and amount of her fortune, and what relations she has, and on what evidence or ground he approves of such person or persons so to be appointed guardian or guardians. And it is ordered, that the said Master do inquire and state what will be proper to be allowed for the maintenance and education of the petitioner during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. And after the said Master shall have made his report, such further order shall be made as shall be just. In the matter of Arnold, M. R., 1st December, 1814. Reg. Lib. (A), 1814, fol. 50.

ORDER FOR LIBERTY TO TAKE INFANTS ABROAD.

His Lordship doth order that the petitioner, as the father of the said infants, plaintiffs, be at liberty to remove the said infants, plaintiffs, with him to America aforesaid, or to such other parts and places beyond the seas, and out of the jurisdiction of this court, in which he shall in the execution of his duty be ordered to find it necessary to reside, there to remain with the petitioner in case the petitioner shall so think fit; the petitioner, by his said petition, undertaking to bring the said infants, plaintiffs, or such of them as shall then be living, back with him, on his return to this country on the fulfilment of his mission in the petition mentioned, unless the petitioner shall in the meantime, from any unforeseen circumstance deem it advisable to send them, or any of them back to this country. But the petitioner is half-yearly to transmit, properly vouched, to be laid before the court, the plan of tuition and education for each of the said infants actually adopted and in practice at the time of such half-yearly return, and specifying particularly where and with whom they reside. *Jackson* v. *Hankey*, L. C., 15th May, 1823. Reg. Lib. (A), 1822, fol. 1088. S. C. Jac. 265. *Supra*, p. 50, 51.

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